No. 96-8837-CFY Title: Donald E. Cleveland and Enrique Gray-Santana, Petitioners
v.
United States

Docketed:
April 30, 1997 Court: United States Court of Appeals for the First Circuit

Entry	Date	Proceedings and Orders
	Apr 30 1997	Petition for writ of certiorari and motion for leave to proceed in forma pauperis filed. (Response due June 30, 1997)
	May 22 1997	Order extending time to file response to petition until June 30, 1997.
	Jun 18 1997	Brief of respondent United States in opposition filed.
	Jul 3 1997	DISTRIBUTED. September 29, 1997
	Nov 25 1997	REDISTRIBUTED. December 12, 1997
	Dec 12 1997	Petition GRANTED. The brief of petitioners is to be filed with the Clerk and served upon opposing counsel on or before 3 p.m., Friday, January 23, 1998. The brief of respondent is to be filed with the Clerk and served upon opposing counsel on or before 3 p.m., Friday, February 20, 1998. A reply brief, if any, is to be filed with the Clerk and served upon opposing counsel on or before 3 p.m., Wednesday, March 18, 1998. Rule 29.2 does not apply. SET FOR ARGUMENT March 23, 1998. **********
	Dec 29 1997	Motion of petitioner Enrique Gray-Santana for appointment of counsel filed.
	Dec 29 1997	Motion of petitioner Donald E. Cleveland for appointment of counsel filed.
	Jan 12 1998	DISTRIBUTED. January 16, 1998 (Page 17)
	Jan 20 1998	Motion for appointment of counsel GRANTED and it is ordered that Norman S. Zalkind, Esquire, of Boston, Massachusetts, is appointed to serve as counsel for the petitioner Enrique Gray-Santana in this case.
	Jan 20 1998	Motion for appointment of counsel GRANTED and it is ordered that John H. Cunha, Jr., Esquire, of Boston, Massachusetts, is appointed to serve as counsel for the petitioner Donald E. Cleveland in this case.
	Jan 23 1998	Brief of petitioners Donald Cleveland and Enrique Gray-Santana filed.
	Jan 23 1998	Brief amici curiae of National Association of Criminal Defense Lawyers, et al. filed. VIDED.
	Jan 23 1998	Joint appendix filed.
	Feb 17 1998	Record filed.
	Feb 20 1998	Brief of respondent United States filed. VIDED.
	Feb 23 1998	CIRCULATED.
	Feb 24 1998	Motion of petitioners for divided argument filed.
	Mar 9 1998	Motion of petitioners for divided argument GRANTED.
	Mar 17 1998	Reply brief of petitioner Enrique Gray-Santana filed.
	Mar 23 1998	ARGUED.

96-8837

No.

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1996

DONALD E. CLEVELAND
ENRIQUE GRAY-SANTANA
PETITIONERS

v.

UNITED STATES OF AMERICA
RESPONDENT

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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ATTORNEYS FOR PETITIONERS

96-8837
Cleveland
v.
United States

QUESTION PRESENTED

Whether an occupant of a moving vehicle "carr[ies] . . . a firearm" in violation of 18 U.S.C. § 924(c), merely because the vehicle's locked trunk contains a firearm that is completely inaccessible to anyone in the passenger compartment.

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OTHER AUTHORITIES

Donald Cleveland and Enrique Gray-Santana hereby petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the First Circuit.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the First Circuit is reported at 106 F.3d. 1056, and reprinted at App. 1a-28a. The unreported opinions of the United States District Court for the District of Massachusetts affirming Gray's and Cleveland's convictions under 18 U.S.C. § 924(c) are reproduced at App. 29a-41a and App. 42a-55a, respectively.

JURISDICTION

The judgment of the United States Court of Appeals for the First Circuit was entered on February 18, 1997. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTORY PROVISION INVOLVED

Section 924(c)(1) of Title 18 provides, in pertinent part: "Whoever, during and in relation to any crime of violence or drug trafficking crime . . . uses or carries a firearm, shall, in addition to the punishment provided for such crime . . . be sentenced to imprisonment for five years[.]"

STATEMENT OF THE CASE

Donald Cleveland and Enrique Gray-Santana, along with two others, were arrested on October 18, 1994, by Drug Enforcement Administration (DEA) agents. DEA agents conducting surveillance at an apartment in Hartford, Connecticut, suspected drug trafficking activity and followed two vehicles to the Boston area. Once in Boston, occupants of the cars driven from Hartford met with Cleveland and Gray, who arrived in the Symphony Hall area driving a Mazda. Agents executed a stop and search and found three firearms in the locked trunk of the Mazda. The firearms were in a closed bag, packed under clothing. Agents found five kilograms of cocaine in an electronically controlled compartment of an Isuzu Trooper, one of the vehicles from Hartford.

On March 15, 1995, a federal grand jury returned an indictment against Cleveland and Gray and, in July of 1995, each entered conditional pleas to (1) attempting to possess cocaine with intent to distribute and, (2) using and carrying a firearm during and in relation to a drug trafficking crime, reserving the right to appeal adverse rulings by the trial court on their motions to suppress and motions *in limine*.[1]

Following this Court's decision in *Bailey v. United States*, __ U.S. __, 116 S. Ct. 501 (1995), Cleveland and

[1] Although Cleveland and Gray appealed the trial judge's adverse rulings on these motions to the First Circuit, these claims are not pursued in the instant petition.

Gray both challenged the imposition of penalties pursuant to 18 U.S.C. §924(c)(1).[2] The trial court judge agreed that a conviction could not be based on "use," as defined in *Bailey*, but held that a conviction could be sustained based on the "carry" prong of the statute. (App. 40a, 54a.)

The First Circuit agreed with the District Court. In so doing, the Court aligned itself with the "the Fourth, Seventh and Tenth Circuits [that] have held that a gun does not need to be readily accessible to be 'carried' in a vehicle." (App. 25a.) The Court acknowledged, however, "that the Second, Sixth and Ninth Circuits have taken a contrary position, requiring that the firearms be immediately accessible." (App. 26a.)

In reaching its holding, the First Circuit addressed the following two questions it considered unresolved by the Supreme Court's holding in *Bailey*: "First, must a firearm be on a suspect's person to be 'carried' or can one also 'carry' a firearm in a vehicle? Second, if one can 'carry' a firearm in a vehicle, must the weapon be immediately accessible to the defendant to be 'carried.'" (App. 20a.)

In answer to the first of these questions, the First Circuit held that a weapon need not be carried on a suspect's person but can be carried in a vehicle. *Id.* The Court

[2] Gray, who attended his sentencing hearing, but against whom judgment had not yet entered at the time of the *Bailey* decision, sought relief *via* a Motion to Correct Sentence and/or for Other Appropriate Relief. Cleveland sought relief after his sentence was imposed pursuant to 28 U.S.C. § 2255.

explained that it had already held, in *United States v. Ramirez-Ferrer*, 82 F.3d 1149 (1st Cir.), *cert. denied*, 117 S. Ct. 405 (1996), that weapon *could* be carried in a "conveyance" (in that case a boat) and that this holding resolved the issue for all vehicular carrying. *Id.*

On the second question, the First Circuit held that "a gun may be 'carried' in a vehicle for the purposes of § 924(c)(1) without necessarily being immediately accessible to the defendant while it is being transported." (App. 21a.) In so doing, the court adopted a broad and inclusive definition of "carrying."

In reaching this result, the First Circuit reviewed the "ordinary or natural meaning" of "carry" looking to dictionary definitions of this term. *Webster's Third New International Dictionary of the English Language Unabridged* 343 (3d ed. 1971), the First Circuit notes, "defines 'carry' as, '1: to move while supporting (as in a vehicle or in one's hands or arms); move an appreciable distance without dragging: sustain as a burden or load and bring along to another place.'" (App. 23a.) The First Circuit cited another definition from *Webster's*, that provides:

> CARRY indicates moving to a location some distance away while supporting or maintaining off the ground. Orig. indicating movement by car or cart, it is a natural word to use in ref. to cargoes and loads on trucks, wagons, planes, ships, or even beasts of burden.

Id. (abbreviations in original). The First Circuit concluded,

"This definition . . . clearly includes the transport of a firearm by car; the concept of whether or not the carried item is within reach plays no part in the definition." *Id.*

The First Circuit rejected the *Black's Law Dictionary*'s more limited definition of "carry[ing] arms or weapons," that provides, "To wear, bear, or carry them upon the person or in the clothing or in a pocket, for the purpose of use, or for the purpose of being armed and ready for offensive or defensive action in the case of a conflict with another person." (App. 23a-24a.) (citing *Black's Law Dictionary* 214 (6th ed. 1990)). Judge Campbell explained:

> We strongly doubt -- given the omnipresence of automobiles in today's world and in drug dealing, and given the basic meaning of "carry" as including transport by vehicle -- that Congress, in prescribing liability for anyone who "uses or carries" a firearm, meant to exclude a defendant who transports the gun in his car, rather than on his person, for use in a drug transaction. Hence the *Black's Law Dictionary* restricted definition of the phrase "carry arms or weapons" seems inapposite here.

Id. The Court concluded: "[W]e see no basis for holding that the guns' lack of instant accessibility precluded them from being 'carried[.]'" (App. 28a.)

REASONS FOR GRANTING THE PETITION

Petitioners seek the intervention of this Court to resolve a split among the Circuit Courts of Appeal regarding the scope of "carrying" a firearm within the meaning of 18 U.S.C. § 924(c)(1). Following this Court's unanimous decision in *Bailey v. United States*, 116 S. Ct. 501 (1995), federal trial and appellate courts have been called upon to reexamine the meaning of "carrying" in light of that opinion; these inquiries have yielded conflicting interpretations.

This circuit split impacts myriad cases. Section 924(c)(1) is charged in thousands of cases annually. The outcome of these cases should not depend, solely, on the circuit in which the charges were brought. The need for uniformity in federal law and federal law enforcement militates that the instant petition be granted. This is especially true given the severity of the punishment meted out pursuant to 18 U.S.C. § 924(c).

Finally, the First Circuit's interpretation conflicts with the language of § 924, as well as the reasoning and holding in *Bailey*. Section 924 establishes penalties for a wide range of criminal activity involving firearms. In its various subparts it imposes liability for, *inter alia*, using, carrying, possessing, transporting, transferring, smuggling, acquiring and importing firearms. The statutory language reflects congressional decision-making regarding the activity sought to be prohibited in the various sections of § 924. The judiciary should not override congressional intent by adopting a definition of "carry" that subsumes possession

and transportation, activities that Congress could have, but chose not to, prohibit in § 924(c).

Moreover, the decision below, in holding that weapons locked in the trunk of a vehicle were carried, expands the scope of carrying as far as any post-*Bailey* opinion to date and effectively deprives *Bailey* of meaning in all vehicular cases. Despite *Bailey*'s holding that § 924(c)(1) does not criminalize mere possession or storage of a firearm, 116 S. Ct. at 508, that is exactly what was criminalized in the case at bar. The backdoor approach should not prevail when access was appropriately denied through the front door.

I. The Circuit Courts of Appeal are Deeply Divided Over the Appropriate Scope of "Carrying" for the Purposes of 18 U.S.C. § 924(c)(1).

Post-*Bailey* decisions have taken widely variant approaches to "carrying" for the purposes of §924(c)(1). The schisms are most dramatic in cases involving weapons found in automobiles.[3] The existence of a circuit split over the

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[3] *Compare United States v. Giraldo*, 80 F.3d 667, 676 (2d. Cir.) (applying its holding that a gun must be within reach to be carried to vehicular cases), *cert. denied*, 117 S. Ct. 135 (1996); *United States v. Riascos-Suarez*, 73 F.3d 616, 623 (6th Cir.) (requiring a showing of "immediate accessibility" of a firearm to sustain a conviction for carrying a weapon in an automobile), *cert. denied*, 117 S. Ct. 136 (1996); *United States v. Staples*, 85 F.3d 461, 464 (9th Cir.) (applying the requirement that a weapon must be on or about defendant's person, or immediately available for use to be carried in an automobile case), *cert. denied*, 117 S. Ct. 318 (1996); *United States v. Moore*, 104 F.3d 377, 380 (D.C. Cir. 1997) (holding that a firearm stowed in the engine

appropriate interpretation of the term "carry" has been widely noted. *See, e.g., United States v. Cooke*, 1997 WL 166290, at * 8 (7th Cir. Apr. 9, 1997) ("The circuits are split on the issue of whether a weapon that is aboard a moving vehicle must be immediately accessible to the defendant in order to support a 'carrying' conviction under § 924(c)(1)."); *Mitchell*, 104 F.3d at 653-54 (noting split among circuits); *United States v. Miller*, 84 F.3d 1244, 1259-60 (10th Cir.) (same) *cert. denied sub nom Hicks v. United States*, 117 S. Ct. 443 (1996); *Cleveland*, 106 F.3d at 1068 (same).

Some courts apply a "transportation and accessibility" test to establish whether a weapon is carried. Some courts require only accessibility. Other courts have held that a person can carry a weapon anywhere in car without regard to that weapon's accessibility. Several circuits contend that *Bailey* left undisturbed their pre-*Bailey* carrying case law. *United States v. Muscarello*, 106 F.3d 636, 638 (5th Cir. 1997); *Ruth*, 100 F.3d at 113; *United States v. Farris*, 77 F.3d 391, 395 n.4 (11th Cir.) *cert. denied,* 117 S. Ct. 241 (1996).

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compartment of a car was not carried); *with United States v. Cleveland*, 106 F.3d 1056, 1066 (1st Cir. 1997) (holding that a gun locked in the trunk of a car was carried); *United States v. Mitchell*, 104 F.3d 649, 653-54 (4th Cir. 1997) (holding that a firearm can be carried in an automobile without being immediately accessible); *United States v. Rivas*, 85 F.3d 193, 195 (5th Cir.) (holding that carrying is proved with evidence that a firearm is knowingly possessed in a vehicle), *cert. denied*, 117 S. Ct. 593 (1996); *United States v. Cooke*, 1997 WL 166290, at *7 (7th Cir. Apr. 9, 1997) (holding that possession and transportation of a weapon constitutes carrying); *United States v. Ruth*, 100 F.3d 111, 113 (10th Cir. 1996) (requiring possession and transportation to sustain a conviction for carrying in vehicular cases).

The Ninth, Sixth and Second Circuits, in post-*Bailey* cases, have adopted a test that requires a showing that a weapon is accessible, to support liability under §924(c).[4]

The Ninth Circuit takes the position that a firearm is carried, within the meaning of §924(c), where it is "easily accessible" to the driver of a vehicle, because, in such circumstances, it is "transported . . . within reach and immediately available for use." *United States v. Willett*, 90 F.3d 404, 407 (9th Cir. 1996). *See also United States v. Staples*, 85 F.3d 461, 464 (9th Cir.), *cert. denied*, 117 C. Ct. 318 (1996).[5] In reaching this conclusion, the Ninth Circuit looked to the "ordinary and natural meaning" of the term carry. *United States v. Hernandez*, 80 F.3d 1253, 1257 (9th Cir. 1996)). After reviewing the *Webster*'s and *Black*'s definitions looked to by the First Circuit, the Ninth Circuit concluded, "These definitions suggest that the term 'carry' involves activity beyond mere possession." *Id.* at 1258. Thus, the Court held, a weapon must be transported on or about a defendant's person and must have been immediately available for use to be carried. *Id.*

The Sixth Circuit also requires evidence of "immediate accessibility" and "transporting" of a firearm to

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[4] The D.C. Circuit and Eighth Circuit may also be aligning themselves with this position. *See* discussion *infra*.

[5] In *Staples*, the Court found that the defendant carried a firearm, within the meaning of §924(c)(1) where "the firearm was in the glove compartment, and thus 'about' his person, within reach and immediately available for use." 85 F.3d at 464.

support liability of carrying. *See United States v. Malcuit*, 104 F.3d 880, 885 (6th Cir. 1997); *United States v. Taylor*, 102 F.3d 767, 769 (6th Cir. 1996); *United States v. Moore*, 76 F.3d 111, 113 (6th Cir. 1996). In *United States v. Riascos-Suarez*, 73 F.3d 616 (6th Cir.) *cert. denied*, 117 S. Ct. 136 (1996), the Sixth Circuit addressed carrying, in a case where the defendant was driving a car and had a firearm within reach. The Court wrote:

> [I]n order for a defendant to be convicted of carrying a gun in violation of section 924(c)(1), the firearm must be immediately available for use -- on the defendant or within his or her reach. Such availability takes the weapon beyond simple possession or storage. Here . . . the gun was visibly placed in the driver's side of the console and not, as in *Bailey*, locked in a trunk or in a footlocker located in a closet.

73 F.3d at 623. These cases indicate that a firearm located in the trunk of an automobile is not "carried" but, instead, is merely possessed or stored.

The Second Circuit too requires "'at least a showing that the gun [was] within reach during the commission of the drug offense' in order to sustain a conviction for carrying a firearm [under §924(c)]." *United States v. Santos*, 84 F.3d 43, 47 (2d Cir. 1996) (citations omitted), *modified*, 95 F.3d 116 (2d Cir. 1996). That Court explains, "We have recognized that '[n]either the legislative history of section 924(c)(1) nor case law in this circuit suggest[s] that the term

'carry' should be construed as having any meaning beyond its literal meaning.' Accordingly, we have construed that term narrowly[.]" 84 F.3d at 46-47 (citations omitted).

In two cases involving automobiles, the Second Circuit applied its accessibility test. In *United States v. Pimentel*, the court found ample evidence to support a conviction for "carrying" a firearm, where the gun in question was located in a compartment located on the back of the front passenger seat, and one of three confederates was seated in the back seat. 83 F.3d 55, 58-59 (2d Cir. 1996). In *United States v. Giraldo*, the court found that the evidence was "plainly insufficient" to convict a back seat occupant where "there was no evidence that he could have reached the gun in the cavity beneath the change dish from where he sat." 80 F.3d 667, 676 (2d Cir.), *cert. denied*, 117 S. Ct. 135 (1996). In contrast, there was sufficient evidence of "carrying" for a second defendant, where the "gun was within easy reach[.]" 80 F.3d at 677.

The D.C. Circuit's opinion in *United States v. Moore*, intimates that a weapon must be accessible to be "carried." 104 F.3d 377, 380 (D.C. Cir. 1997). In that case the court concluded, without discussion and with the agreement of the government, that evidence of a weapon stowed in the engine compartment of a car was insufficient to sustain liability for using or carrying a firearm under § 924(c)(1). *Id.*[6] This

[6] It is worthy of note that the ultimately successful dissenters to the D.C. Circuit's *en banc* opinion in *Bailey*, 36 F.3d 106, 120 (D.C. Cir. 1994) (Williams, Siberman and Buckley, J.J. dissenting) argued that immediate accessibility was required for "carrying." The dissenters

holding suggests that the D.C. Circuit may join ranks with the Second, Sixth and Ninth Circuits.[7]

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explained:

> [We] do not believe § 924(c) can properly be extended . . . [to a] defendant who, like Bailey, transports the weapon in his car but is not shown to have had immediate access at any time while he was committing his drug trafficking offense. The effect would be to have § 924(c) embrace virtually every instance where a drug trafficker transports a weapon; in view of Congress's provision of a separate penalty in an adjacent section for anyone who "transports" a weapon with intent to commit a crime punishable by as much as a year's imprisonment, 18 U.S.C. § 924(b), that seems an improbable duplication. Rather, consonant with an active notion of "use," with Senate Report's example of a weapon carried in the defendant's pocket, and with the principle of the "constructive possession" cases that the defendant may use the gun on a moment's notice, the word "carry" must entail immediate availability. Thus, the gun locked in the trunk of Bailey's car was not accessible enough to support a conviction for carrying the gun during and in relation to his possession with intent to distribute drugs.

36 F.3d at 125 (citations omitted).

[7] The Eighth Circuit may also be inclined toward this position. Although not expressly requiring accessibility, the Eighth Circuit has found carrying, in its opinions to date, only where a weapon has been accessible. Most recently the Eighth Circuit wrote, "We will assume, without deciding, that ready availability of the firearm is required for a 'carry' conviction in this Circuit." *United States v. Nelson*, 1997 WL 149200 (8th Cir. Apr. 2, 1997) (citing to its pre-*Bailey* decision in *United States v. Freisinger*, 937 F.2d 383, 388 n.4 (8th Cir. 1991)). That Circuit has also held that "the ordinary meaning of the word 'carry' includes transporting firearms in the *passenger compartment* of a car loaded with drugs." *United States v. Willis*, 89 F.3d 1371, 1378 (8th Cir.) (emphasis

In sharp contrast to the Second, Sixth and Ninth Circuits, the Fourth, Fifth, Tenth and now First Circuits do not require that a weapon be accessible to be carried within the meaning of § 924(c)(1).

The Fourth Circuit has rejected any accessibility requirement for "carrying." *United States v. Mitchell*, 104 F.3d 649, 653 (4th Cir. 1997). That court explains: "the firearm placed in the trunk of the automobile for the journey to the transfer point is obviously being 'carried' under the plain meaning of that term, the firearm does not cease to be 'carried' simply because it is not readily accessible to the offender." *Id.* at 653-54. It is enough, the court concluded, that a defendant "knowingly possessed and transported the firearm in his automobile." *Id.* at 654.

The Tenth Circuit requires possession and transportation to sustain liability for carrying under § 924(c)(1). *United States v. Ruth*, 100 F.3d 111, 113 (10th Cir. 1996). That circuit has held that it sees "nothing in

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added), *cert. denied*, 117 S. Ct. 273 (1996). *See also United States v. Rhodenizer*, 106 F.3d 222 (8th Cir. 1997); *United States v. John R. Caldwell*, 97 F.3d. 1063, 1070 (8th Cir. 1996) (finding that a weapon was carried where it was located "in the hatchback portion of the Camaro, an area regarded (at least in case law) as generally within reach and available for use by the occupants of the car"); *United States v. White*, 81 F.3d 80, 83 (8th Cir. 1996) ("in order to sustain a conviction for 'carrying' a firearm . . . the government must prove that [the defendant] bore the firearm on or about his person during and in relation to a drug trafficking offense"); *United States v. Johnson*, 108 F.3d 919, 921 (8th Cir. 1997) (same). These decisions advert to a requirement that, even when transported in a vehicle, a weapon must be *accessible* to be "carried."

Bailey that conflicts with [its] pre-*Bailey* 'vehicular carrying' line of cases." *Id.* (citing *Miller*, 84 F.3d at 1260). These cases, "correctly interpreted, hold that the government is required to prove only that the defendant transported a firearm in a vehicle and that he had actual or constructive possession of the firearm while doing so." *Miller*, 84 F.3d at 1259. The Tenth Circuit has also clarified, however, that, following *Bailey* "neither storage nor possession of a gun, without more, satisfies the 'carry' prong of §924(c)(1)." *Ruth*, 100 F.3d at 113; *United States v. Spring*, 80 F.3d 1450, 1464 (10th Cir.), *cert. denied*, 117 S. Ct. 385 (1996).

Similarly, the Fifth Circuit, based on its pre-*Bailey* case law, requires only knowing possession of a firearm in a vehicle during and in relation to drug trafficking to sustain a conviction for carrying. *United States v. Muscarello*, 106 F.3d 636, 638 (5th Cir. 1997). In *United States v. Rivas*, the Fifth Circuit reviewed its precedent and noted:

> [W]e examined the "carrying" requirement of §924(c) and explained that the "word 'carry' derives from the French *carier*, which means 'to transport in a vehicle.' . . . Significantly, we also recognized that carrying on the person is different from carrying in a vehicle "because the means of carrying is the vehicle itself."

85 F.3d 193, 195 (5th Cir.), *cert. denied*, 117 S. Ct. 593 (1996). In *Muscarello*, this reasoning enabled a finding of carrying where the "pistol was in the glove compartment of [the defendant's] truck where it had been for a long period of

time[, arguably as a part of lawful employment.]" 106 F. 3d at 637.

Although the Seventh Circuit appeared to have taken a stance similar to that adopted by the First, Fourth, Fifth and Tenth Circuits -- that immediate accessibility was not required to support a finding of carrying in the vehicular context -- the most recent decision from that circuit indicates that this determination has not yet been made. In *United States v. Cooke*, the Seventh Circuit wrote:

> The circuits are split on the issue of whether a weapon that is aboard a moving vehicle must be immediately accessible to the defendant in order to support a "carrying" conviction under § 924(c)(1). This Circuit has not yet expressly held that such a showing is required.

1997 WL 166290, at * 8-9. The *Cooke* opinion backs off a position articulated in dicta in *United States v. Molina,* that, "Although in *Baker* we declined to decide whether the presence of a firearm and drugs in the trunk of a car would be sufficient for a conviction under § 924(c)(1), today we state that it would[.]" 102 F.3d 928, 932 (7th Cir. 1996) (referring to *United States v. Baker*, 78 F.3d 1241 (1996). Judge Wood, concurring in *Cooke*, wrote separately to explain her view of the current state of the law in the Seventh Circuit. She explains:

> Neither *Molina* nor Cooke's case presents facts that require us to resolve the question reserved in *Baker*. . . . It would be a considerable expansion of

§ 924(c)(1)'s "carrying" theory to hold that guns located in locked trunks, or in a suitcase located within the cargo hold of an airplane, were also "carried." We should take the same care in differentiating between "carrying" and mere possession as the Supreme Court required us to do with the analogous distinction between "use" and mere possession in [*Bailey*]. When we are presented with a case where the question of immediacy is squarely presented, it will be time enough to decide how direct access must be to satisfy the "carrying" language of § 924(c)(1).

1997 WL 166290, at *10. *But see Cooke*, 1997 WL 166290, at *10 ("I write separately because my colleagues' opinions leave the unfortunate impression that the validity of this court's very recent and very clear decision in [*Molina*] is somehow in question.") (Coffey, J., concurring). In sum, following *Cooke*, the Seventh Circuit appears to hold that carrying is defined as "to move while supporting: TRANSPORT[,]" *id.* at *6, but it is not clear whether immediate accessibility is also required.

The Eleventh Circuit, in *United States v. Farris*, while maintaining that pre-*Bailey* cases govern, did not articulate its own view of the scope of those cases. 77 F.3d 391, 395, 395 n.4 (11th Cir.), *cert. denied*, 117 S. Ct. 241 (1996). The Court found only that there was sufficient evidence that an automobile was "used as a drug distribution center" and that the defendant knew of the gun in the glove compartment. *Id.* at 395. "Put differently, [the court wrote,] the jury could find that the firearm was being carried by [the

defendant] in the vehicle." *Id.* at 395-396.

In sum, the post-*Bailey* case law from the Second, Sixth, Ninth, D.C. and, possibly, Eighth Circuits supports the position that the petitioners *did not* "carry" a weapon in violation of §924(c). Therefore, if petitioners had been prosecuted in any of these circuits, they would have been found not guilty of "carrying" a weapon.

The First Circuit has held that the petitioners *did* carry weapons in violation of § 924(c)(1), despite the fact that the weapons in question were inaccessible and located in the locked trunk of their car. It appears that the Fourth, Fifth, Tenth, Eleventh and, possibly, Seventh Circuits would likely agree, although based on differing analyses and, in several circuits, based solely on *their* pre-*Bailey* carrying case law.

The circuit split on this issue has fully evolved and requires the intervention of this Court for its resolution.

II. Federal Trial Courts are Flooded with Cases Raising This Important Issue.

The importance of the issue presented in the instant petition is magnified by the fact that federal trial and appellate courts apply § 924(c)(1) thousands of times each year. Since *Bailey* was decided over 120 cases presenting questions about the scope of "carrying" for the purposes of §924(c)(1) have been decided and reported by federal district and appellate courts.

A study of federal firearm-related offenses indicates that of the nearly 7,000 federal sentences for firearms offenses in fiscal year 1993, 82% of those sentenced had "used or carried" a firearm during another crime. U.S. Dept. of Justice, *Federal Firearms-Related Offenses*, Bureau of Justice Statistics, NCJ-148950 (June 1995). Although not all of these convictions may have been pursuant to § 924(c)(1), one report based on information from the U.S. Sentencing Commission states that 1,973 people were sentenced for conviction of a violation of § 924(c)(1) in the fiscal year ending September 30, 1995. Frank J. Murray, *Mandatory 5-year Sentence for Gun Use Curbed by Court*, Washington Times, Dec. 7, 1995, at A-6.

Moreover, following *Bailey*'s narrowing of the scope of use, it can be expected that § 924(c)(1) cases will increasingly allege violation of the carrying provision of the statute.

This Court should resolve the circuit split sooner rather than later to reduce the ultimate burden on the lower courts. Once the scope of carrying is clarified, cases now being decided may require reconsideration by the lower courts. Where, as here, the split is well developed by the lower appellate courts, this Court should step in to avoid continued uncertainty over the state of the law.

III. The First Circuit's Decision Conflicts with the Language and Legislative History of Section 924, as well as with the Reasoning and Holding of This Court's Opinion in Bailey and is Erroneous.

The First Circuit's holding in the petitioners' case conflicts with the language of § 924, as well as the reasoning of this Court in *Bailey*.

The language and structure of § 924 support a tailored definition of "carry." Section 924 addresses a broad spectrum of firearms-related activity including using, carrying, possessing, transporting, transferring, smuggling, acquiring and importing firearms. Subsection 924(c)(1) however, addresses *only* using and carrying. The statutory language reflects congressial decision-making regarding the activity it sought to prohibit in the various subsections of § 924. The judiciary should not override congressional intent by adopting a definition of "carry" that subsumes possession and transportation, activities that Congress could have, but chose not to, prohbit in § 924(c). "Carry" should be accorded the same careful construction that this Court undertook in defining "use" in *Bailey*.

The legislative history of § 924(c) undercuts the reasoning the First Circuit used in rejecting a tailored definition of "carry." In evaluating the "plain meaning" of the term "carry" the First Circuit rejected the *Black's Law Dictionary* definition of "carry arms or weapons," that provides, "To wear, bear, or carry them upon the person or in the clothing or in a pocket, for the purpose of use, or for the purpose of being armed and ready for offensive or defensive

action in the case of a conflict with another person." (App.23a-24a.) (citing *Black's Law Dictionary* 214 (6th ed. 1990)). The First Circuit dismissed this definition, stating

> We strongly doubt -- given the omnipresence of automobiles in today's world and in drug dealing, and given the basic meaning of "carry" as including transport by vehicle -- that Congress, in prescribing liability for anyone who "uses or carries" a firearm, meant to exclude a defendant who transports the gun in his car, rather than on his person, for use in a drug transaction.

Id. However, section 924(c) was initially enacted as part of the Gun Control Act of 1968, Pub. L. No. 90-618, § 102, 82 Stat. 1213, 1224, and prohibited using or carrying a firearm "*during the commission of any felony which may be prosecuted in a court of the United States*," *id.* (emphasis added). It was not until the passage of the Firearm Owners' Protection Act of 1986, Pub. L. No. 99-308, § 104, 100 Stat. 449, 457, that Congress expanded the reach of section 924(c) to include "crime[s] of violence" and "drug trafficking offense[s]." *Id.* Consequently, contrary to the First Circuit's ruminations, Congress likely was not considering "the omnipresence of automobiles in today's world and in drug dealing" when it used the word "carry" in drafting § 924(c), because drug trafficking offenses were added to the statute *eighteen (18) years* after the word "carry" was chosen by Congress.

In any event, although *Bailey* did not reach the scope of the "carry" prong of §924(c), its discussion provides guidance regarding the appropriate contours of liability for "carrying." This guidance falls in line with the more tailored *Black's* definition of carrying arms or weapons. *Bailey* substantially limited the scope of use for the purposes of § 924(c)(1). In holding that "use" required a showing of "active employment," this Court stated that "'use' must connote more than mere possession of a firearm by a person who commits a drug offense." *Bailey*, 116 S. Ct. at 506. This Court also held that "use" did not encompass "intended use, as when an offender places a firearm with the intent to use it later if necessary." *Id.* at 507. *Bailey* emphasized: "Had Congress intended possession alone to trigger liability under §924(c)(1), it easily could have so provided. This obvious conclusion is supported by the frequent use of the term 'possess' in the gun-crime statutes to describe prohibited gun-related conduct." *Id.* at 506.

The First Circuit's holding in petitioners' case sidesteps these limitations imposed by *Bailey*. The First Circuit simply expands the definition of "carrying" to include much of what was prohibited as "use" in *Bailey* -- that is, possession, storage and placement for future use -- and runs counter to the analysis in *Bailey*.

Bailey provides instruction regarding activities constituting, and not constituting, carrying. *Bailey* addresses ways in which "use" differs from "carrying" in the context of §924(c)(1). The Court reviewed the statutory language and assessed its import:

> Congress has specified two types of conduct with a firearm: "uses" or "carries." . . . We assume that Congress used two terms because it intended each term to have a particular, nonsuperfluous meaning. While a broad reading of "use" undermines virtually any function for "carry," a more limited, active interpretation of "use" preserves a meaningful role for "carries" as an alternative basis for a charge. Under the interpretation we enunciate today, a firearm can be used without being carried, *e.g.*, when an offender has a gun on display during a transaction, or barters with a firearm without handling it; and a firearm can be carried without being used, *e.g.*, when an offender keeps a gun hidden in his clothing throughout a drug transaction.

Bailey, 116 S. Ct. at 507. From this discussion, one learns that carrying can be found where a firearm is handled, or when a weapon is located on a person's body or in his or her clothing. This discussion also elucidates some of what carrying *is not*: carrying *is not* having a gun on display, or bartering with a firearm without handling it.

The broad interpretation of "carry" articulated by the First Circuit is invalid for exactly the same reasons as this Court invalidated a broad interpretation of "use" in *Bailey*. This Court reasoned that a broad interpretation of "use" would "swallow up any significance for 'carry.'" 116 S. Ct. at 508. This Court continued, "If Congress had intended to deprive 'use' of its active connotations, it could have simply

substituted a more appropriate term -- 'possession' -- to cover the conduct it wished to reach." *Id.* Similarly, to expand "carry" to reach all possession would vitiate any independent meaning for "use" in the vehicular context. The First Circuit's holding would extend the reach of § 924(c)(1) to instances of simple possession or storage and placement of a firearm for future use -- liability squarely rejected in *Bailey*. The Court's careful analysis and its holding in *Bailey* would be dramatically undercut if "carry" were expanded to cover this broad terrain.

In conclusion, this court *has* provided meaningful guidance regarding the appropriate scope of carrying pursuant to § 924(c)(1). Some courts have acknowledged and responded to the limitations suggested by *Bailey*. *See, e.g., Malcuit*, 104 F.3d at 886 ("*Bailey* . . . significantly changed the § 924(c)(1) analysis from that previously employed by this court"). Other courts, including the First Circuit, have decided cases in a manner that conflicts with the language and analysis of *Bailey*. Still other courts have simply held that *Bailey* did not change their carrying law and have ignored the dramatic implications of that case for carrying liability. *See, e.g., Muscarello*, 106 F.3d at 638. This court should speak to resolve the circuit conflict and unify the federal law vis-a-vis this statutory provision.

CONCLUSION

The petition for a writ of *certiorari* should be granted.

Respectfully submitted,

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APPENDIX

UNITED STATES of America, Appellee,
v.
Donald E. CLEVELAND, Defendant, Appellant.
UNITED STATES of America, Appellee,
v.
Ramon E. VASQUEZ, Defendant, Appellant.
UNITED STATES of America, Appellee,
v.
Enrique GRAY-SANTANA, Defendant, Appellant.
Nos. 96-1043, 96-1669, 96-1128 and 96-1659.

United States Court of Appeals,
First Circuit.
Heard Dec. 6, 1996.
Decided Feb. 18, 1997.

Following jury trial, first defendant was convicted in the United States District Court for the District of Massachusetts, Robert E. Keeton, J. of conspiracy to possess cocaine with intent to distribute and possession of cocaine with intent to distribute. Codefendants pleaded guilty to attempting to possess cocaine with intent to distribute and to carrying or using firearm during and in relation to drug trafficking crime. All defendants appealed. The Court of Appeals, Campbell, Senior Circuit Judge, held that: (1) police had probable cause to arrest first defendant at time he was ordered from automobile, such that search of defendant's person was proper; (2) district court's reasonable doubt instruction was proper; (3) police had probable cause to search vehicle occupied by second and third defendants; (4) second defendant's statement to law enforcement agent following arrest was voluntary; and (5) placement of firearms in trunk of defendants' automobile was sufficient to support conviction for "carrying" firearm during and in relation to drug trafficking crime.

Affirmed.

Inga S. Bernstein and *John H. Cunha*, Boston, MA, by Appointment of the Court, with whom *Norman S. Zalkind*, Zalkind, Rodriguez, Lunt & Duncan and Salsberg, Cunha & Holcomb, P.C. were on consolidated briefs, for defendants-appellants Enrique Gray-Santana and Donald E. Cleveland.

Oliver C. Mitchell, Jr., Boston, MA, with whom *Donnalyn B. Lynch Kahn* and Goldstein & Manello, P.C. were on brief for defendant-appellant Ramon E. Vasquez.

Andrea Nervi Ward, Assistant United States Attorney, Boston, MA, with whom *Donald K. Stern*, United States Attorney, was on briefs, for the United States.

Before BOUDIN, Circuit Judge, CAMPBELL, Senior Circuit Judge, and BOWNES, Senior Circuit Judge.

CAMPBELL, Senior Circuit Judge.

Ramon E. Vasquez appeals from his conviction by a jury for conspiracy to possess cocaine with intent to distribute in violation of 21 U.S.C. § 846 and for possession of cocaine with intent to distribute in violation of 21 U.S.C. § 841. He contends that the district court erred in denying his motion to suppress certain physical evidence and in omitting "hesitate to act" language from its reasonable doubt instruction.

Enrique Gray-Santana and Donald Cleveland, who were Vasquez's co-defendants, pleaded guilty to attempting to possess cocaine with intent to distribute in violation of 21

U.S.C. §§ 846 and 841(a) and to carrying or using a firearm during and in relation to a drug trafficking crime in violation of 18 U.S.C. § 924(c)(1). As their guilty pleas permit, they now appeal from the district court's denials of their motions to suppress and motions in limine. They also appeal from the district court's denial of relief from their s 924(c)(1) convictions for carrying or using a firearm in relation to a drug crime. They argue that their guilty pleas and convictions should be invalidated under *Bailey v. United States*, --- U.S. ----, 116 S.Ct. 501, 133 L.Ed.2d 472 (1995), a decision handed down by the Supreme Court shortly after acceptance of their guilty pleas.

I. Background

Most of the facts are not in dispute. Gray-Santana ("Gray"), a resident of New York City, arranged to secure five to eight kilograms of cocaine from co- defendant Juan Rodriguez (not a present appellant). Gray intended to sell the cocaine through other contacts he had in Boston, so he arranged to take delivery in Boston.

On the morning of October 18, 1994, Gray travelled by bus to Boston, planning to meet Cleveland. Cleveland picked Gray up in a rented white Mazda 929 he had borrowed from a friend and took him to his house. There, Cleveland and Gray placed three loaded handguns inside a Louis Vuitton duffel bag and put the bag inside the Mazda's trunk. The two planned to use the guns to rob their suppliers of their cocaine. At around 4 p.m., Cleveland and Gray were paged by Rodriguez. They then left in the Mazda to meet Rodriguez in the Symphony Hall area of Boston.

At this time, the Drug Enforcement Administration

was investigating one Juan Pagan. The DEA had information that Pagan was shipping large amounts of cocaine from Puerto Rico to New England. On October 17, 1994, heightened phone activity led DEA Agents to begin physical surveillance, including videotaping, of the Connecticut apartment complex where Juan Pagan resided. Around noon on October 18, 1994, two cars arrived at the complex. The first was a Lexus, driven by William Acosta with Vasquez in the back seat. The second was a Lincoln, driven by Rodriguez.

After the cars parked, Rodriguez handed Acosta a black bag and then Acosta took the bag up to Pagan's apartment. Vasquez, carrying a cellular phone, got out of the Lexus and sat with Rodriguez in the Lincoln. After ten or fifteen minutes, Acosta came back and spoke to Vasquez, prompting Vasquez and Rodriguez to leave the complex in a brown Oldsmobile driven by one Jorge Quinones. An hour or so later, Vasquez returned in the Oldsmobile, followed by Rodriguez in a white Isuzu Trooper.

The DEA had received information from two confidential sources that Pagan used a white Isuzu Trooper in his drug operations. These informants had also told the DEA that some of Pagan's vehicles had hidden compartments used to hold drugs. One of the informants had stated that Pagan's white Isuzu Trooper had such a hidden compartment under the rear seat.

After the Isuzu arrived, Acosta and Rodriguez were observed examining its back seat area. Acosta then left, driving the Lexus with Vasquez in the back seat. Rodriguez followed them in the Isuzu. The two cars drove to Boston on major highways, staying close to 55 miles per hour. DEA

agents followed them the entire way.

After the caravan arrived in the Symphony Hall area of Boston, Acosta, and Rodriguez parked the cars. Acosta then used the Lexus to guide Cleveland and Gray, who had arrived in the Mazda, to where the Isuzu was parked. Acosta drove away, and Vasquez was next observed sitting in the back seat of the Mazda. Gray exited the Mazda and got into the Isuzu. Vasquez got into the front seat of the Mazda. The two cars began to drive off. At this point, the DEA agents blocked them. The agents ordered the occupants of both cars to exit their vehicles and handcuffed them. The agents then moved the suspects and their cars out of traffic to a nearby parking lot.

The agents searched the Isuzu and found six kilograms of cocaine in a concealed compartment underneath the back seat. They then searched the Mazda and found the bag in the trunk containing the three guns, rope and duct tape. At that point, the four men were told they were under arrest.

A few hours after his arrest, while he was in custody, Gray gave a statement to DEA agent Bruce Travers confessing to participation in the events described above.

Vasquez filed a motion to suppress the physical evidence found on his person at the time of his arrest. The district court denied his motion. Vasquez was tried by a jury and convicted of conspiracy to possess cocaine with intent to distribute and of possession of cocaine with intent to distribute. The court sentenced him to 121 months in prison.

Cleveland and Gray eventually pled guilty to

attempting to possess cocaine with intent to distribute and to carrying or using a firearm during and in relation to a drug trafficking crime, subject to their right to appeal any adverse ruling by the district court on their motions to suppress physical evidence and to suppress Gray's post-arrest statement. The district court denied their motions and sentenced each of them to 180 months in prison and 60 months of supervised release.[1] After the Supreme Court came down with its Bailey decision, --- U.S. ----, 116 S.Ct. 501, 133 L.Ed.2d 472, Cleveland and Gray moved in the district court for relief from the conviction for carrying or using a firearm in relation to a drug trafficking crime. The court denied that motion.

II. Vasquez

A. The Search of Vasquez's Person:

In his first point of error, Vasquez argues that the district court erred in denying his motion to suppress the physical evidence the agents found on his person. This included a pager, address book, business cards, and notes tying Vasquez to the other defendants. He contends that a wrongful de facto arrest occurred when he was initially ordered out of the Mazda and handcuffed. (Only later was Vasquez told he was under arrest and thereafter searched, by which time the cocaine had been discovered in the Isuzu.) Because the initial de facto arrest was allegedly without probable cause, Vasquez argues that it was illegal and that it

[1] Rodriguez pleaded guilty to conspiracy and possession charges and was also sentenced to 120 months in prison and 60 months of supervised release.

tainted all subsequent events, causing the later search of his person to violate the Fourth Amendment.

The district court held, however, and we agree, that the agents had probable cause to arrest Vasquez at the time they ordered him out of the Mazda and handcuffed him. Accordingly, regardless of whether the arrest occurred then or later, the arrest was legal and the subsequent search of his person was proper. "[I]t is well established that '[i]f an arrest is lawful, the arresting officers are entitled to search the individual apprehended pursuant to that arrest.' " *United States v. Torres-Maldonado*, 14 F.3d 95, 105 (1st Cir.) (quoting *United States v. Uricoechea-Casallas*, 946 F.2d 162, 165 (1st Cir.1991)), *cert. denied*, --- U.S. ----, 115 S.Ct. 193, 130 L.Ed.2d 125 (1994).

"Law enforcement officers may effect warrantless arrests provided that they have probable cause to believe that the suspect has committed or is committing a crime." *United States v. Martinez-Molina*, 64 F.3d 719, 726 (1st Cir.1995) (citing *United States v. Watson*, 423 U.S. 411, 416-18, 96 S.Ct. 820, 824-25, 46 L.Ed.2d 598 (1976); *Gerstein v. Pugh*, 420 U.S. 103, 113-14, 95 S.Ct. 854, 862-63, 43 L.Ed.2d 54 (1975)). "[The government] need only show that, at the time of the arrest, the facts and circumstances known to the arresting officers were sufficient to warrant a prudent person in believing that the defendant had committed or was committing an offense." *Torres- Maldonado*, 14 F.3d at 105. See also *Beck v. Ohio*, 379 U.S. 89, 91, 85 S.Ct. 223, 225-26, 13 L.Ed.2d 142 (1964).

"Of course, probable cause must exist with respect to each person arrested, and 'a person's mere propinquity to others independently suspected of criminal activity does not,

without more, give rise to probable cause to search that person.' " *Martinez-Molina*, 64 F.3d at 726 (quoting *Ybarra v. Illinois*, 444 U.S. 85, 91, 100 S.Ct. 338, 342, 62 L.Ed.2d 238 (1979)). "[C]ases in which courts find that probable cause exists generally involve substantially more than a momentary, random, or apparently innocent association between the defendant and the known criminal activity." *Martinez-Molina*, 64 F.3d at 727 (discussing cases).

Here, prior to seizing Vasquez, the agents had been investigating Pagan and his drug trafficking operations for several years. Before the events of this case, the agents had learned from informants that Pagan was trafficking in kilogram quantities of cocaine, shipping it from Puerto Rico to Hartford, Connecticut and Springfield, Massachusetts. The agents had learned that Pagan used couriers to transport the cocaine. Some of Pagan's couriers had been arrested at the San Juan airport with several kilograms of cocaine in their luggage and had admitted to working for Pagan.

Two confidential informants who had each proved reliable in related matters had told DEA agents that among the many vehicles Pagan used to transport drugs and money was a white Isuzu Trooper. They each also related that Pagan's transport vehicles often had a concealed, electronically-controlled compartment used to hide whatever was being moved. One of them asserted that he had seen that the white Isuzu Trooper had such a compartment in the floor under the rear seat.

The agents had also learned from one of the informants and from other sources that Pagan's girlfriend lived in apartment D-219 at the Connecticut apartment complex and that Pagan used that apartment in his drug

activities. The apartment was listed under the name "J. Pagan." The DEA had installed a pen register on the apartment's phone so they could track calls made to and from that number.

On October 17, 1994, the pen register revealed a sharp increase in phone activity from the Connecticut apartment. Some of the numbers being called matched cellular phone and beeper numbers that the agents knew belonged to Pagan's previously identified drug associates. The agents decided to begin physical surveillance of the Connecticut apartment. This surveillance included agents stationed around the apartment complex and two agents who were equipped with a video camera in an apartment that had a view of Pagan's apartment.

A little after noon on October 18th, the agents observed a Lexus and a Lincoln Town Car enter the apartment's parking lot. The various movements of people and vehicles that followed, coupled with the DEA's information about Pagan's drug dealing, strongly indicated that a drug transaction was taking place. Acosta, who had been driving the Lexus, entered Pagan's apartment building followed by Rodriguez, carrying a large black shoulder bag. Rodriguez handed this bag to Acosta in the building's lobby. Later on, the agents saw Acosta talking to Pagan on Pagan's balcony.

Vasquez exited the Lexus and walked over to Rodriguez and the Lincoln carrying a cellular phone, one of the "well known tools of the drug trade." *United States v. De La Cruz*, 996 F.2d 1307, 1311 (1st Cir.), *cert. denied*, 510 U.S. 936, 114 S.Ct. 356, 126 L.Ed.2d 320 (1993). *See also Martinez-Molina*, 64 F.3d at 728. Vasquez waited with

Rodriguez inside the Lincoln until Acosta came out with another man, Jorge Quinones, and spoke to Vasquez. Then Quinones left, returning shortly in a brown Oldsmobile. Vasquez and Rodriguez got into the Oldsmobile and drove out of the complex.

An hour or so later Vasquez and Quinones returned, followed by Rodriguez in a white Isuzu Trooper, exactly the car the agents had been told Pagan used to transport drugs and drug proceeds. It was also the vehicle said to have a hidden compartment for drugs and money in the floor under the rear seat. While Pagan stood on his balcony overlooking the parking lot, Acosta and Rodriguez were seen to be looking into the Isuzu's back seat area, where the secret compartment was said to be located.

At this point, the agents had probable cause to believe that Vasquez, Rodriguez, Acosta, Pagan, and Quinones were involved in a drug transaction, with the Isuzu Trooper likely bearing the contraband. Rather than arrest the suspects immediately, the agents chose to follow the Isuzu Trooper and the Lexus as they drove to Boston.

What happened thereafter--beginning with the drive in tandem to Boston and ending with the agents' intervention--was wholly consistent with the existence of an unfolding drug transaction and Vasquez's active involvement. Vasquez and Rodriguez stood on a Boston street corner, apparently checking the area for police. Later, and after the agents had seen Acosta speak to Cleveland and Gray, the agents spotted Vasquez inside the Mazda, to which he had moved from the Lexus. Vasquez was still inside the Mazda with Cleveland when the agents stopped the vehicles and ordered everyone out.

By this time, the agents had abundant evidence to constitute probable cause that Vasquez was involved in an ongoing drug trafficking crime and that his association with the other suspects was not momentary, random, or innocent. They had authority, therefore, at the time he was ordered from the Mazda and handcuffed, to arrest Vasquez. The district court did not err in refusing to suppress the various items later found on Vasquez's person when he was searched.

B. The Reasonable Doubt Instruction:

Vasquez asserts that the district court erred in refusing to include "hesitate to act" language in its reasonable doubt instruction. In particular, Vasquez insists that, upon his objection to the omission, the court should have complied with his request to tell the jury, "When we talk about a reasonable doubt, we mean a doubt based upon reason and common sense, the kind of doubt that would make a reasonable person hesitate to act."

The short answer to this argument is that this court has explicitly held that a district court's refusal to include "hesitate to act" language in its explanation of reasonable doubt to the jury does not constitute reversible error. *See United States v. Vavlitis*, 9 F.3d 206, 212 (1st Cir.1993); *United States v. O'Brien*, 972 F.2d 12, 15 (1st Cir.1992). Although we accepted an instruction that included such language in *United States v. Drake*, 673 F.2d 15, 21 (1st Cir.1982), we have also criticized the "hesitate to act" formulation. *See Gilday v. Callahan*, 59 F.3d 257, 264 (1st Cir.1995) (characterizing the "hesitate to act" language as "arguably unhelpful"), *cert. denied*, --- U.S. ----, 116 S.Ct. 1269, 134 L.Ed.2d 216 (1996); *O'Brien*, 972 F.2d at 15-16 (criticizing instructions such as the "hesitate to act"

formulation which compare reasonable doubt to the decisional standard used by individual jurors in their own affairs as trivializing the constitutionally required burden of proof).

The Supreme Court has stated that the Constitution does not require district courts to define reasonable doubt, nor does it require trial courts who do choose to explain the term to employ "any particular form of words ... in advising the jury of the government's burden of proof." *Victor v. Nebraska*, 511 U.S. 1, 5, 114 S.Ct. 1239, 1243, 127 L.Ed.2d 583 (1994). "Rather, 'taken as a whole, the instructions must correctly convey the concept of reasonable doubt to the jury.'" *Id.* (quoting *Holland v. United States*, 348 U.S. 121, 140, 75 S.Ct. 127, 138, 99 L.Ed. 150 (1954)).

In instructing the jury on reasonable doubt, the district court stated:

> As I have said, the burden is upon the Government to prove beyond a reasonable doubt that a defendant is guilty of the charge made against the defendant. It is a strict and heavy burden, but it does not mean that a defendant's guilt must be proved beyond all possible doubt. It does require that the evidence exclude any reasonable doubt concerning a defendant's guilt. A reasonable doubt may arise not only from the evidence produced but also from a lack of evidence.
>
> Reasonable doubt exists when, after weighing and considering all the evidence, using reason and common sense, jurors

cannot say that they have a settled conviction of the truth of the charge.

> Of course, a defendant is never to be convicted on suspicion or conjecture. If, for example, you view the evidence in the case as reasonably permitting either of two conclusions--one that a defendant is guilty as charged, the other that the defendant is not guilty--you will find the defendant not guilty.
>
> It is not sufficient for the Government to establish a probability, though a strong one, that a fact charged is more likely to be true than not true. That is not enough to meet the burden of proof beyond reasonable doubt. On the other hand, there are very few things in this world that we know with absolute certainty, and in criminal cases the law does not require proof that overcomes every possible doubt.
>
> Concluding my instructions on the burden, then, I instruct you that what the Government must do to meet its heavy burden is to establish the truth of each part of each offense charged by proof that convinces you and leaves you with no reasonable doubt, and thus satisfies you that you can, consistently with your oath as jurors, base your verdict upon it. If you so find as to a particular charge against a defendant, you will return a verdict of guilty on that charge. If, on the other hand, you think there is a reasonable

doubt about whether the defendant is guilty of a particular offense, you must give the defendant the benefit of the doubt and find the defendant not guilty of that offense.

This explanation correctly conveyed the concept of reasonable doubt to the jury.

III. Cleveland and Gray

A. The Vehicle Searches:

In their first point of error, Cleveland and Gray argue that the district court erred in refusing to grant their motion to suppress the evidence found in the agents' search of the Isuzu Trooper and of the Mazda.

"A police officer may effect a warrantless search of the interior of a motor vehicle on a public thoroughfare as long as he has probable cause to believe that the vehicle contains contraband or other evidence of criminal activity." *United States v. Staula*, 80 F.3d 596, 602 (1st Cir.), *cert. denied*, --- U.S. ----, 117 S.Ct. 156, 136 L.Ed.2d 101 (1996). *See also California v. Acevedo*, 500 U.S. 565, 570, 111 S.Ct. 1982, 1986, 114 L.Ed.2d 619 (1991); *Chambers v. Maroney*, 399 U.S. 42, 46-52, 90 S.Ct. 1975, 1978- 82, 26 L.Ed.2d 419 (1970); *United States v. Martinez-Molina*, 64 F.3d 719, 730 (1st Cir.1995). When the police have probable cause to search a vehicle, they may also search closed containers within that vehicle. *See Acevedo*, 500 U.S. at 569-81, 111 S.Ct. at 1985-92.

Even assuming that Cleveland and Gray have standing to contest the searches in this case, a problematic

proposition in itself, the agents clearly had probable cause to search the vehicles. As explained in Part II-A, above, by the time the agents stopped the two cars, they had probable cause to believe that the defendants were involved in a drug transaction and that the Trooper contained contraband. The movements of the Mazda in following the Lexus to rendezvous with the Isuzu, when combined with the exchange of personnel--Gray moving into the Isuzu and Vasquez entering the Mazda--provided the agents with probable cause to believe that Cleveland and Gray were also involved in the drug transaction and that the Mazda contained contraband. The warrantless search thus did not violate the Fourth Amendment, and the district court did not err in refusing to suppress the evidence found in the two vehicles.

B. Gray's Statement:

In the next point of error, Gray asserts that the district court should have suppressed the statement he made to Agent Travers in the DEA office after his arrest. Gray claims that he had invoked his right to counsel before making the statement and that the agents coerced the statement from him through intimidation.

The district court, after holding two evidentiary hearings at which it heard the testimony of Gray, Agent Travers, and another agent present at DEA headquarters the night of Gray's arrest, concluded that Gray's various allegations of coercive activity by the agents were not credible. The court also found that Gray had initiated the conversation with the agents that led to his confession by knocking on the door of his cell. Gray then told Agent Travers that he wished to speak with him about the events

leading up to his arrest and signed a written waiver of his rights. After examining the record, we believe that these findings of fact by the district court were not clearly erroneous. *See United States v. Valle*, 72 F.3d 210, 213-14 (1st Cir.1995) ("In reviewing orders granting or denying suppression motions, this court scrutinizes a district court's factual findings, including its credibility determinations, for traces of clear error.").

In this case, as in *Valle*, "whether or not to suppress the challenged statements boils down to a credibility call" and "[s]uch calls are grist for the district court's mill." *Valle*, 72 F.3d at 214. Since Gray initiated the contact with the agents that led to his statement after he had invoked his right to counsel, the district court was correct to deny the motion to suppress. *See Edwards v. Arizona*, 451 U.S. 477, 484-86, 101 S.Ct. 1880, 1884-86, 68 L.Ed.2d 378 (1981) (holding that once a defendant has asked for an attorney, she is not subject to further interrogation by the police until after counsel has been made available to her unless she herself initiates further communication with the authorities); *United States v. Fontana*, 948 F.2d 796, 805-06 (1st Cir.1991) (noting that initiation of interrogation by the accused has been broadly interpreted); *Watkins v. Callahan*, 724 F.2d 1038, 1042 (1st Cir.1984) (stating that "an accused is not powerless to countermand an election to talk to counsel").

Similarly, we find no clear error in the district court's determination that the agents did not commit the coercive acts alleged by Gray. *See United States v. Burns*, 15 F.3d 211, 216 (1st Cir.1994) ("Although the ultimate issue of voluntariness is a question of law subject to plenary review, we will accept the district court's subsidiary findings of fact unless they are 'clearly erroneous.' ").

Based on the facts as found by the district court, the court's holding that Gray's statement was voluntary and therefore admissible at trial under 18 U.S.C. § 3501 was proper.

The court applied the totality of the circumstances test mandated by 18 U.S.C. § 3501(b), paying particular attention to the factors identified by that section.[2] Gray gave his statement within six hours of his arrest, bringing this case within the rule of § 3501(c).[3] The court found that Gray

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[2] 18 U.S.C. § 3501(b) states:

> (b) The trial judge in determining the issue of voluntariness shall take into consideration all the circumstances surrounding the giving of the confession, including (1) the time elapsing between arrest and arraignment of the defendant making the confession, if it was made after arrest and before arraignment, (2) whether such defendant knew the nature of the offense with which he was charged or of which he was suspected at the time of making the confession, (3) whether or not such defendant was advised or knew that he was not required to make any statement and that any such statement could be used against him, (4) whether or not such defendant had been advised prior to questioning of his right to the assistance of counsel; and (5) whether or not such defendant was without the assistance of counsel when questioned and when giving such confession. The presence or absence of any of the above-mentioned factors to be taken into consideration by the judge need not be conclusive on the issue of voluntariness of the confession.

[3] 18 U.S.C. § 3501(c) states, in relevant part:

> (c) In any criminal prosecution by the United States ... a confession made or given by a person who

knew the nature of the offense of which he was suspected at the time he made the confession; knew that he was not required to make any statement and that any statement he did make could be used against him; and had been advised prior to the questioning of his right to the assistance of counsel. The court acknowledged that Gray had been without the assistance of counsel when he gave his statement, but held that in this case, this fifth factor was heavily outweighed by the other four factors and by the case's particular circumstances.

We agree with the district court that Gray's statement was voluntary.

C. The "Carry" Issue:

Cleveland and Gray pleaded guilty to violating 18 U.S.C. § 924(c)(1). That statute imposes a five-year prison term on anyone who, "during and in relation to any crime of violence or drug trafficking crime ... uses or carries a firearm." 18 U.S.C. § 924(c)(1). After the Supreme Court's opinion in *Bailey*, they both sought revocation of their convictions based on guilty pleas to the § 924(c)(1) charges. Gray, against whom judgment had not yet entered, filed an unsuccessful Motion to Correct Sentence under Fed.R.Crim.P. 35(c), and Cleveland, against whom judgment had entered and whose direct appeal was already pending, filed an equally unavailing motion under 28 U.S.C. § 2255.

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is a defendant therein, while such person was under arrest ... shall not be inadmissible solely because of delay in bringing such person before a magistrate ... if such confession was made or given by such person within six hours immediately following his arrest or other detention....

The various appeals were consolidated. The government does not dispute our jurisdiction to consider on the merits Cleveland and Gray's claims that their guilty pleas are invalid in light of Bailey. Since we reject those claims, we do not address any potential jurisdictional question stemming from Cleveland's § 2255 appeal.

The broad definition of "use" formerly employed by this circuit and under which Cleveland and Gray pleaded guilty was unanimously disapproved by the Supreme Court in *Bailey*. Stating the need to interpret statutory terms in accordance with their "ordinary or natural" meaning, the Court relied on the dictionary definition of "use" in holding that a conviction under the "use" prong of the statute could only be upheld if the defendant "actively employed the firearm during and in relation to the predicate crime." *Bailey*, --- U.S. at ---- - ----, 116 S.Ct. at 506-09. Mere possession or storage of the weapon is insufficient. *Id.* at ---- - ----, 116 S.Ct. at 508-09.

Under *Bailey*, Cleveland and Gray cannot be convicted under § 924(c)' s "use" prong. The guns remained in the Mazda's trunk throughout the events in question; neither Cleveland nor Gray "actively employed" the firearm. Their guilty pleas might still, however, be upheld under the statute's "carry" prong.

While *Bailey* did not address the requirements relative to "carry," the Supreme Court stated that part of its rationale for defining "use" more narrowly was to preserve a separate, nonsuperfluous meaning for "carry." *Bailey*, --- U.S. at ----, 116 S.Ct. at 507. The Court wrote, "Under the interpretation we enunciate today, a firearm can be used without being carried, *e.g.*, when an offender has a gun on

display during a transaction, or barters with a firearm without handling it; and a firearm can be carried without being used, e.g., when an offender keeps a gun hidden in his clothing throughout a drug transaction." *Id.* at ----, 116 S.Ct. at 507. The Court remanded the case for a determination of whether a defendant could be convicted under the "carry" prong either for having a gun inside a bag in a locked car trunk or for having an unloaded firearm in a locked footlocker inside a bedroom closet. *Id.* at ----, 116 S.Ct. at 509.

Bailey leaves us with two questions concerning the proper interpretation of "carry." First, must a firearm be on a suspect's person to be "carried" or can one also "carry" a firearm in a vehicle? Second, if one can "carry" a firearm in a vehicle, must the weapon be immediately accessible to the defendant to be "carried"?

The first question is easily answered. We have already held post-*Bailey* that a firearm can be "carried" in a boat, a conveyance that seems indistinguishable for present purposes from a land vehicle like a car. *United States v. Ramirez-Ferrer*, 82 F.3d 1149 (1st Cir.), *cert. denied*, --- U.S. ----, 117 S.Ct. 405, 136 L.Ed.2d 319 (1996).

This result accords both with our pre-*Bailey* "carry" cases and with the holdings of the other circuits to have considered this issue post-*Bailey*. *See, e.g.*, *United States v. Plummer*, 964 F.2d 1251, 1252-54 (1st Cir.) (acknowledging the defendant-driver's concession that the presence of a gun in his vehicle either in the driver's seat or on the front passenger seat was sufficient to establish that he had "carried" a gun under § 924(c)(1)), *cert. denied*, 506 U.S. 926, 113 S.Ct. 350, 121 L.Ed.2d 265 (1992); *United States v. Eaton*, 890 F.2d 511, 511-12 (1st Cir.1989)

(acknowledging the defendant's concession that he had "carried" a gun for the purposes of § 924(c)(1) when the gun had been under the front seat of the truck he was driving), *cert. denied*, 495 U.S. 906, 110 S.Ct. 1927, 109 L.Ed.2d 291 (1990); *United States v. Giraldo*, 80 F.3d 667, 677-78 (2d Cir.) (upholding a § 924(c)(1) conviction for "carrying" a gun in a car), *cert. denied*, --- U.S. ----, 117 S.Ct. 135, 136 L.Ed.2d 83 (1996); *United States v. Mitchell*, 104 F.3d 649, 652-54 (4th Cir. 1997) (same); *United States v. Fike*, 82 F.3d 1315, 1327-28 (5th Cir.) (stating that a gun may be "carried" in a car), *cert. denied*, --- U.S. ---- - ----, 117 S.Ct. 241-42, 136 L.Ed.2d 170 (1996); *United States v. Riascos-Suarez*, 73 F.3d 616, 623 (6th Cir.) (same), *cert. denied*, --- U.S. ----, 117 S.Ct. 136, 136 L.Ed.2d 84 (1996); *United States v. Molina*, 102 F.3d 928, 930-32 (7th Cir.1996) (same); *United States v. Willis*, 89 F.3d 1371, 1377-79 (8th Cir.) (same), *cert. denied*, --- U.S. ----, 117 S.Ct. 273, 136 L.Ed.2d 196 (1996); *United States v. Staples*, 85 F.3d 461, 464 (9th Cir.) (same), *cert. denied*, --- U.S. ----, 117 S.Ct. 318, 136 L.Ed.2d 233 (1996); *United States v. Miller*, 84 F.3d 1244, 1256-61 (10th Cir.) (same), *cert. denied*, --- U.S. ----, 117 S.Ct. 443, 136 L.Ed.2d 339 (1996); *United States v. Farris*, 77 F.3d 391, 395 (11th Cir.) (upholding a s 924(c)(1) conviction for "carrying" a gun in a car), *cert. denied*, --- U.S. ----, 117 S.Ct. 241, 136 L.Ed.2d 170 (1996).

On the second question, we agree with the Fourth, Seventh and Tenth Circuits that a gun may be "carried" in a vehicle for the purposes of § 924(c)(1) without necessarily being immediately accessible to the defendant while it is being transported. *See Miller*, 84 F.3d at 1260; *Molina*, 102 F.3d at 930-32; *Mitchell*, 104 F.3d at 652-53.

Since *Bailey*, this Circuit has twice faced questions

concerning the scope of the statute's "carry" prong. In *United States v. Manning*, 79 F.3d 212 (1st Cir.), *cert. denied*, --- U.S. ----, 117 S.Ct. 147, 136 L.Ed.2d 93 (1996), we held that carrying a briefcase containing a gun, pipe bombs, drugs, and drug paraphernalia was sufficient to fulfill the "carry" requirement. In *Ramirez-Ferrer*, already noted, we held that a loaded revolver covered by a T-shirt within the defendant's reach on a cocaine-laden boat upon which the defendant was travelling was being "carried" for the purposes of § 924(c)(1). In neither case, however, did we have to decide whether a firearm in a vehicle in which a defendant is travelling needs to be within easy reach to be "carried" for the purposes of § 924(c)(1).

Since some circuits have, since *Bailey*, continued to rely upon their pre-*Bailey* "carry" case law, we look at ours as well, but find no case that is entirely on point. *See, e.g., United States v. Castro-Lara*, 970 F.2d 976, 982-83 (1st Cir.1992) (upholding a conviction under § 924(c)(1) when the gun was in a briefcase in a locked car trunk without specifying whether the conviction was under the statute's "use" or "carry" prong), *cert. denied*, 508 U.S. 962, 113 S.Ct. 2935, 124 L.Ed.2d 684 (1993); *Plummer*, 964 F.2d at 1252-54 (acknowledging the defendant-driver's concession that the presence of a gun in his vehicle either in the driver's seat or on the front passenger seat was sufficient to establish that he had "carried" a gun under § 924(c)(1)); *Eaton*, 890 F.2d at 511-12 (acknowledging the defendant's concession that he had "carried" a gun for the purposes of § 924(c)(1) when the gun had been under the front seat of the truck he was driving).

"When a word is not defined by statute, we normally construe it in accord with its ordinary or natural meaning."

Smith v. United States, 508 U.S. 223, 228, 113 S.Ct. 2050, 2054, 124 L.Ed.2d 138 (1993). In *Bailey*, the Supreme Court turned to the dictionary for help in determining the meaning of "use," *Bailey*, --- U.S. at ----, 116 S.Ct. at 506, so we do the same with "carry."

Webster's Third New International Dictionary of the English Language Unabridged 343 (3d ed. 1971) defines "carry" as, "1: to move while supporting (as in a vehicle or in one's hands or arms): move an appreciable distance without dragging: sustain as a burden or load and bring along to another place." *Webster's* goes on to list many other definitions of the word and then, in differentiating "carry" from some of its synonyms, states:

> CARRY indicates moving to a location some distance away while supporting or maintaining off the ground. Orig. indicating movement by car or cart, it is a natural word to use in ref. to cargoes and loads on trucks, wagons, planes, ships, or even beasts of burden.

Id. This definition, therefore, clearly includes the transport of a firearm by car; the concept of whether or not the carried item is within reach plays no part in the definition.

Black's Law Dictionary 214 (6th ed. 1990) defines "carry" as, "To bear, bear about, sustain, *transport*, remove, or *convey*. To have or bear upon or about one's person, as a watch or weapon; locomotion not being essential ...." (emphasis supplied). However, *Black's* defines the specific phrase "carry arms or weapons" more narrowly as, "To wear, bear, or carry them upon the person or in the clothing or in a

pocket, for the purpose of use, or for the purpose of being armed and ready for offensive or defensive action in case of a conflict with another person." *Id.*

The latter *Black's* definition of "carry arms or weapons" limits "carrying" to the defendant's person and so at least implies accessibility. However, even the circuits which have read an immediate accessibility requirement into "carry" under § 924(c)(1) have never limited the statutory language to "carrying" a firearm on the person. Indeed, such circuits, like the others to confront the issue, have all upheld convictions for "carrying" a weapon in a car. *See United States v. Cruz-Rojas*, 101 F.3d 283, 286 (2d Cir.1996) (remanding two "carry" convictions to determine if a gun under a car's dashboard was accessible to either defendant); *Riascos-Suarez*, 73 F.3d at 623 (upholding a "carry" conviction when the gun was in a car near the driver's seat); *United States v. Willett*, 90 F.3d 404, 406-07 (9th Cir.1996) (holding that a gun transported in a car was "carried" because it was easily accessible).

We strongly doubt--given the omnipresence of automobiles in today's world and in drug dealing, and given the basic meaning of "carry" as including transport by vehicle--that Congress, in prescribing liability for anyone who "uses or carries" a firearm during or in relation to a drug trafficking offense, meant to exclude a defendant who transports the gun in his car, rather than on his person, for use in a drug transaction. Hence the Black's Law Dictionary restricted definition of the phrase "carry arms or weapons" seems inapposite here.

It is true, of course, that to come under § 924(c)(1), "the firearm must have some purpose or effect with respect

to the drug trafficking crime; its presence or involvement cannot be the result of accident or coincidence." *Smith*, 508 U.S. at 238, 113 S.Ct. at 2059. In certain circumstances, a firearm's immediate accessibility to a defendant might be relevant to determining whether or not he was carrying it "during and in relation to" a drug trafficking crime, as the statute requires. 18 U.S.C. § 924(c)(1). But a firearm need not always be instantly accessible in order to be carried "during and in relation to" a drug trafficking crime. Here, the evidence shows that the defendants had placed the three firearms in question in the Mazda's trunk and, when arrested, were carrying them for the purpose of using them to rob their suppliers during the ongoing drug trafficking crime. Evidence of this purpose plainly demonstrated the necessary nexus to the drug trafficking offense wholly apart from whether the guns were within the immediate reach of those seated in the car at the time they were stopped by the agents.

As noted above, the Fourth, Seventh, and Tenth Circuits have held that a gun does not need to be readily accessible to be "carried" in a vehicle. *See Mitchell*, 104 F.3d at 652-54; *Molina*, 102 F.3d at 930-32; *Miller*, 84 F.3d at 1256-61.

Other circuits, while not explicitly deciding the issue one way or the other, appear to be leaning toward adopting the same approach. *See United States v. Pineda-Ortuno*, 952 F.2d 98, 103-04 (5th Cir.) (a pre-*Bailey* case holding that the circuit's cases requiring a showing that the gun was within the defendant's reach during the commission of the drug offense did not apply when the gun was "carried" in a vehicle), *cert. denied*, 504 U.S. 928, 112 S.Ct. 1990, 118 L.Ed.2d 587 (1992); *United States v. Fike*, 82 F.3d 1315, 1327-28 (5th Cir.1996) (a post-*Bailey* case upholding a

defendant's conviction under § 924(c)(1) for "carrying" a gun that was within his reach in a car but not stating that accessibility was a requirement); *United States v. Rivas*, 85 F.3d 193, 194-96 (5th Cir.) (same), *cert. denied*, --- U.S. ----, 117 S.Ct. 593, 136 L.Ed.2d 521 (1996); *United States v. Willis*, 89 F.3d 1371, 1377-79 (8th Cir.1996) (relying on pre-*Bailey* case law to hold that transporting a firearm in the passenger compartment of a vehicle satisfies the "carry" prong of § 924(c)(1) but not addressing the weapon's accessibility); *United States v. Caldwell*, 97 F.3d 1063, 1068-70 (8th Cir.1996) (upholding a conviction under § 924(c)(1)'s "carry" prong for a case in which the defendant's gun was in a car's hatchback, an area the court regarded as within the car's occupants' reach); *United States v. Farris*, 77 F.3d 391, 395 (11th Cir.1996) (relying on pre-*Bailey* case law to uphold a § 924(c)(1) conviction for a defendant who was sitting in the back seat of a car while the firearm in question was in the glove compartment but not discussing whether the defendant could easily have reached the gun).

We recognize that the Second, Sixth, and Ninth Circuits have taken a contrary position, requiring that the firearms be immediately accessible. *See Giraldo*, 80 F.3d at 676-78; *Riascos-Suarez*, 73 F.3d at 623-24; *Staples*, 85 F.3d at 464. We find the reasoning of these courts unpersuasive. In *Giraldo*, the Second Circuit relied entirely on its pre-*Bailey* case *United States v. Feliz-Cordero*, 859 F.2d 250 (2d Cir.1988), in holding that a gun transported in a vehicle must be immediately accessible to be "carried." But *Feliz-Cordero* merely stated that "carry" should be given its literal meaning. The court thought that the literal meaning of "carry," when the "carrying" was done by a vehicle, required the gun to be within reach during the commission of the drug

offense. *Feliz-Cordero*, 859 F.2d at 253. The court did not refer to any authority for this proposition and cited to only one case, *United States v. Brockington*, 849 F.2d 872 (4th Cir.1988). *Brockington* does not so much as mention an immediate accessibility requirement, nor does it discuss the meaning of "carry." The only relevance *Brockington* has to this issue is that that panel upheld the "carry" conviction of a taxi cab passenger who had a loaded pistol under the floormat beneath his seat.

The Sixth Circuit in *Riascos-Suarez* inferred the immediate availability requirement from the Supreme Court's admonitions in *Bailey* that "use" must mean more than "possession," *Bailey*, --- U.S. at ----, 116 S.Ct. at 508, and that a defendant could not be charged under § 924(c)(1) for mere storage of a weapon, id. The easy reach requirement, the *Riascos-Suarez* panel reasoned, is necessary to distinguish "carry" from possession and storage. *Riascos-Suarez*, 73 F.3d at 623.

We disagree. We question the degree to which an easy reach requirement would differentiate "carry" from "possess." More importantly, we agree with the Tenth Circuit that the distinguishing characteristic of "carry" is not the instant availability of the item carried, but the fact that the item is being moved from one place to another by the carrier, either personally or with the aid of some appropriate vehicle. *See Miller*, 84 F.3d at 1260.

The Ninth Circuit's decision in *Staples* relied primarily on its earlier opinion in *United States v. Hernandez*, 80 F.3d 1253, 1256-58 (9th Cir.1996) (holding that a gun in a locked toolbox was not "carried" under § 924(c)(1)), in stating that a firearm had to be immediately

available for use to be "carried" in a vehicle. The *Hernandez* panel looked to find the ordinary or natural meaning of "carry." But its quotation from *Webster's* definition of "carry," *supra*, was selective, omitting the definition's references to vehicles. The court also quoted from *Black's* definition of the single phrase, "carry arms or weapons," supra, and cited the Sixth Circuit's *Riascos-Suarez* opinion.

As we have discussed, however, the ordinary meaning of the term "carry" includes transport by vehicle and affords no basis for imposing an accessibility requirement.

Turning to the case before us, both Cleveland and Gray pled guilty to using or carrying a weapon during and in relation to a drug trafficking offense. They do not now contend, nor could they, that the three loaded handguns found in the trunk of their car alongside rope and duct tape were unrelated to the drug trafficking offense they were committing at the time they were apprehended. In fact, Cleveland admitted at the suppression hearing that he and Gray intended to use the guns to rob the drugs from their suppliers. Their challenge to their convictions on the § 924(c)(1) charge consists solely of the claim that, after *Bailey*, they can not be convicted under the statute's "use" prong and that a conviction under the "carry" prong would require the guns to have been easily accessible. As under the standard definition of "carry" the guns were being "carried," and as we can see no basis for holding that the guns' lack of instant accessibility precluded them from being "carried," we affirm Cleveland's and Gray's convictions for violations of 18 U.S.C. § 924(c)(1).

Affirmed.

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

CRIMINAL CASE NO. 95-10292-REK

UNITED STATES OF AMERICA

v.

JUAN RODRIGUEZ, RAMON VASQUEZ,
ENRIQUE GRAY and DONALD CLEVELAND,
Defendants

Memorandum and Order
April 25, 1996

Before this court is defendant Enrique Gray's Motion for Correction of Sentence or Other Appropriate Relief (Docket No. 175, filed December 8, 1995). Defendant Gray makes this motion under Federal Rule of Criminal Procedure 35(c) and, in the alternative, under 28 U.S.C. §2255, and he also seeks to withdraw his plea.

Because a final judgment in this case has not yet been entered as to defendant Gray, the court treats the pending motion as a motion to reconsider sentencing, and, in the alternative, to withdraw his plea. In any event, whatever the most appropriate procedural label may be, I conclude that it is appropriate to decide defendant Gray's challenge to the sentence on the merits.

I. Background

The relevant facts giving rise to Defendant Gray's arrest and guilty plea are summarized here. These facts are based on the summary of evidence presented by the government during defendant Gray's Change of Plea Hearing. At that hearing, defendant Gray agreed that he did the acts attributed to him in the summary of evidence.

Before October 18, 1994 defendant Gray arranged with defendant Rodriguez to purchase between five and eight kilograms of cocaine. Defendant Rodriguez made arrangements to get the cocaine and transport it to Boston. Defendant Gray called his friend, defendant Cleveland, in Boston to alert him to an opportunity to make some money. After arrival in Boston, defendant Gray made plans with defendant Cleveland to meet defendant Rodriguez and associates of Rodriguez and to steal some of the cocaine rather than purchase it. Defendants Gray and Cleveland, "pursuant to the plan to steal it [the cocaine]," obtained weapons.

Meanwhile, agents of the Drug Enforcement Administration ("DEA agents") in Connecticut had a known drug trafficker under surveillance at an apartment complex in Rocky Hill, Connecticut. Four individuals, including defendants Rodriguez and Vasquez, were observed leaving the apartment complex. Defendant Rodriguez was driving a white Isuzu, and defendant Vasquez and the other two individuals were in a Lexus. DEA agents followed the vehicles from Connecticut into Boston to the vicinity of Symphony Hall. The driver of the Lexus was observed talking with defendant Gray who was sitting in a white Mazda driven by defendant Cleveland. All three vehicles

were eventually observed parked close together on St. Stephens Street. At this point, defendant Vasquez was seen sitting in the back seat of the Mazda. The Lexus departed and defendant Gray was then observed getting into the Isuzu with defendant Rodriguez. Both vehicles then attempted to leave the area. The DEA agents stopped and detained all of the defendants and searched both vehicles. The agents confiscated six kilograms of cocaine found in a hidden compartment of the Isuzu and three handguns found in the trunk of the Mazda.

On July 21, 1995 Defendant Gray pled guilty to counts three and five of the second superseding indictment. Under count three, defendant Gray was charged with attempting to possess cocaine with intent to distribute in violation of 21 U.S.C. §846, and under count five, defendant Gray was charged with carrying and using a firearm during and in relation to a drug trafficking crime in violation of 18 U.S.C. §924(c)(1).

On November 29, 1995 defendant Gray was sentenced to 120 months in prison for the offense charged in count three, and, concurrently, 60 months for the offense charged in count five, to be followed by 60 months supervised release.

On December 6, 1995 the Supreme Court issued an opinion in *Bailey v. United States*, 116 S.Ct. 501 (1995), in which the Court narrowed the interpretation of "use" under §924(c)(1). Defendant Gray now challenges the sentence imposed on him at the November 29, 1995 hearing and contends that the factual basis for his guilty plea to count five no longer constitutes a crime under the new interpretation of §924(c)(1) announced in *Bailey*.

II.

A. Interpretation of §924(c)(1) under *Bailey v. United States*

Before the decision announced in *Bailey v. United States*, convictions for "use" under §924(c)(1) were upheld in this circuit where a firearm was simply present for the protection of drugs for sale. *See, United States v. McFadden*, 13 F.3d 463 (1st Cir. 1994) (presence of an unloaded gun between mattress and boxspring in defendant's apartment is sufficient evidence for "use" of a firearm in violation of §924(c)(1) under "fortress" theory). In *Bailey*, a unanimous Court rejected application of the statute on the basis of a "fortress" theory and held that in order to support a finding of "use" under §924(c)(1), the evidence must be "sufficient to show an active employment of the firearm by the defendant, a use that makes the firearm an operative factor in relation to the predicate offense." *Bailey*, 116 S.Ct. at 505. The Court stated that active employment includes, "brandishing, displaying, bartering, striking with, and most obviously, firing or attempting to fire, a firearm." *Id.* at 508.

Defendant Gray asserts that under this new interpretation his guilty plea to count five is not supported by sufficient facts and therefore his sentence for the violation in count five should be vacated. The government contends that there is no basis on which to vacate defendant Gray's sentence because he was also indicted for and pled guilty to "carrying" a firearm in violation of §924(c)(1) and a sufficient factual basis exists to support his guilty plea.

Under the definition of "use" announced in *Bailey*,

there is no evidence in this case that defendant Gray ever "used" a firearm in relation to drug trafficking. But, in *Bailey* the Court explicitly did not address whether there was evidence sufficient to convict the defendant of "carrying" a firearm in violation of §924(c)(1). Bailey's conviction was based on evidence of a loaded pistol that was found in a bag in the trunk of his car. *Id.* at 504. The Court remanded the case for the Court of Appeals for the District of Columbia Circuit to consider whether there was a basis for upholding the conviction under the "carry" prong of the statute. *Id.* at 509.

Although the Court in *Bailey* interpreted only the "use" prong of §924(c)(1), its approach to analyzing the statute, as well as First Circuit cases before *Bailey*, are instructive.

B. Carrying a Firearm in Violation of §924(c)(1)

Section 924(c)(1) states in relevant part:

> Whoever, during and in relation to any...drug trafficking crime...uses or carries a firearm, shall, in addition to the punishment provided for such...drug trafficking crime, be sentenced to imprisonment for five years.

In order to support a finding of violation of §924(c)(1) the evidence must show that 1) a defendant either used or carried a firearm and 2) that it was in relation to drug trafficking activity. *See, United States v. Wight*, 968 F.2d 1393, 1396 (1st Cir. 1992). Because the evidence on which defendant Gray pled guilty is not enough to support a conviction for the "use" prong of §924(c)(1), as it was

interpreted in *Bailey*, defendant Gray's plea to count five of the second superseding indictment can stand only if the evidence on which he pled guilty is sufficient to show that he "carried" a firearm "in relation to" drug trafficking activity.

The Court in *Bailey* states that Congress would have used the word "possess" if it had meant for possession of a firearm to constitute a violation of §924(c)(1). *Id.* at 506. For that reason, "carry" must mean more than mere possession of a firearm. *See also, United States v. Plummer*, 964 F.2d 1251 (1st Cir. 1992) (mere possession of a gun during the course of criminal conduct will not support a conviction). In addition, if a word is not explicitly defined by statute, it should be given its ordinary meaning. *See, United States v. Manning*, -- F.3d -- (1st Cir. 1996), 1996 WL 116990 (3/21/96), *citing, Smith v. United States*, 113 S.Ct. 2050, 2054 (1993) (noting that words not defined by statute should be given their ordinary or common meaning). The Random House Dictionary of the English Language, Second Edition (1987), defines "carry" as follows: "to take or support from one place to another; convey; transport."

Defendant Gray contends that, after the decision announced in *Bailey*, "carry" must be interpreted to mean "on or about the defendant's person." Some circuits have required a showing that a firearm has been on or about the defendant's person in order to support liability under the "carry" prong of §924(c)(1). *See e.g., United States v. Hernandez*, -- F.3d -- (9th Cir. 1996), 1996 WL 34822 (1/31/96) (gun found inside a locked toolbox during the drug trafficking crime was not "carried" under §924(c)(1)); *and, United States v. White*, -- F.3d -- , (8th Cir. 1996), 1996 WL 154228 (3/21/96) (court upheld defendant's conviction for "carrying" a firearm where gun was found under coat

discarded by the defendant during flight from police). But, other circuits have required only that a firearm be accessible. *See e.g., United States v. Feliz-Cordero*, 859 F.2d 250, 253 (2nd Cir. 1988) (a firearm is carried if it was "within reach during the commission of the drug offense"). Since the decision in *Bailey* was announced, no circuit has decided whether evidence of guns found in a bag in a locked trunk, along with evidence that the guns were acquired and transported for use in relation to the drug trafficking crime, is sufficient to support a conviction for "carrying" a firearm in violation of §924(c)(1). *See e.g., United States v. Baker*, 78 F.3d 1241, 1247 (7th Cir. 1996) (court explicitly stated that its decision did not state an opinion "on whether a defendant who has drugs and a fully operable and loaded gun locked in the trunk of his car could be convicted under §924(c)(1) for carrying a firearm"). In fact, consideration of the same issue was left to the Court of Appeals for the District of Columbia Circuit when the Supreme Court remanded *Bailey*.

I conclude that I cannot sustain defendant Gray's contention that "[i]n this Circuit, a §924(c)(1) conviction for carrying has required that the weapon be immediately accessible." Defendant Gray's Memorandum in Support of Motion for Correction of Sentence (Docket No. 177), p.5. In both cases cited by defendant Gray for this proposition, the court was addressing the "in relation to" requirement of the statute and did not make a decision about the requirement for which defendant Gray cites them. *See, United States v. Plummer*, 964 F.2d 1251, 1253-1254 (1st Cir. 1992) ("Defendant conceded that the presence of the gun in his vehicle was sufficient to establish...that he 'carried a firearm' [citations omitted]. Defendant argues, however, that the evidence was insufficient to establish...that he carried the gun 'in relation to'..."); *and, United States v. Payero*, 888 F.2d

928, 929 (1st Cir. 1989) (where "[t]he only issue on appeal was whether the trial court correctly and adequately instructed the jury with respect to the 'during and in relation to' element [of] the statute").

In the First Circuit, two cases decided since *Bailey* have addressed the scope of "carry". In *United States v. Manning*, -- F.3d -- (1st Cir. 1996), 1196 WL 116990, 2 (3/21/96), the court did not define the "precise contours" of "carry", but held that "Manning's actions me[]t any reasonable contours of the 'carry' prong." In *Manning*, the defendant was observed carrying a briefcase into a garage. Shortly thereafter, a police officer found the briefcase that contained cocaine, a handgun and six pipebombs. In *United States v. Ramirez-Ferrer*, -- F.3d -- (1st Cir. 1996), 1996 WL 125595, 4 (3/27/96), the court, sitting en banc, vacated the defendants' convictions under the "use" prong, but required reconsideration by the panel on the "carry" prong "since *Bailey* has both limited the word 'use' to the extent that it cannot apply in the instant case and emphasized that 'carry' has meanings not covered by 'use'." In *Ramirez-Ferrer* a loaded handgun was found covered by a t-shirt in a storage compartment near the location where one of the defendants had been sitting when the defendants' boat, in which they were transporting cocaine, was interdicted off the coast of Puerto Rico. *Id.* at 2. Both cases recognize that the ordinary meaning of "carry" includes transporting a firearm without actually holding it.

Before *Bailey*, courts in this circuit did not clearly distinguish between "use" and "carry" under §924(c)(1). But, convictions for violations under §924(c)(1) were upheld where a firearm was found in a vehicle, but was not necessarily accessible to the defendant. In those cases the

focus was on the "facilitative nexus" between the possession of the firearm and its role in the criminal activity. *See, United States v. Castro-Lara*, 970 F.2d 976, 983 (1st Cir. 1992); *and, United States v. Reyes-Mercado*, 22 F.3d 363 (1st Cir. 1994).

In *Castro-Lara*, the case most closely analogous to the one before this court, an unloaded firearm and live ammunition were found in a briefcase in the locked trunk of the defendant's car. Authorities apprehended the defendants when they were about to drive off carrying cocaine that they picked up at an airstrip. The court in *Castro-Lara* focused on the location of the firearm ("at the place where drugs were to be delivered") and the defendant's timing (the defendant "brought the gun to the airstrip in the course of taking delivery of...cocaine") in affirming the defendant's conviction. *Castro-Lara*, 970 F.2d at 983. The court held that the evidence was sufficient to show that the gun was "available for use in connection with the narcotics trade," rejected any requirement that the gun be on the defendant's person, and did not hold "instant availability" to be the critical concern. *Id.* The court in *Castro-Lara* also noted First Circuit cases in which a firearm found in a defendant's vehicle, but not on his person, was sufficient to support a conviction under §924(c)(1). *Id.* The focus in those cases has been to distinguish from "mere possession," but not require that a defendant have actively employed a firearm. Although the interpretation of §924(c)(1) in *Bailey* creates a requirement for "active employment" when there is an indictment for "use", the Court made it clear that "carry" must be given a distinct and separate meaning. *Bailey*, 116 S.Ct. at 507.

The analysis in *Castro-Lara* is in accord with the

Court's emphasis in *Bailey* on congressional intent that "require[s] more than possession to trigger the statute's application." *Id.* In *Bailey*, the Court decided what "more" means when there is an indictment for "use", but not when there is an indictment for "carry". The evidence is this case indicates that defendants Gray and Cleveland did more than merely possess the three guns. During the afternoon of October 18, 1994 defendants Cleveland and Gray planned to steal the cocaine, obtained guns that were placed in a bag in the trunk of the Mazda, and then transported the guns to the meeting with defendants Rodriguez and Vasquez. As in *Castro-Lara*, both the location of the guns (in the car they were using in their drug trafficking scheme) and defendant Gray's and defendant Cleveland's timing (obtaining the guns in order to steal the cocaine) indicates that defendants Gray and Cleveland controlled the guns and that the guns facilitated their attempt to possess cocaine. By their own admissions the guns had a central role in their scheme to possess some, if not all, of the cocaine being transported in the Isuzu.

The First Circuit cases cited above contrast with defendant Gray's contention that there is a requirement in this circuit that a firearm be on or about the defendant's person in order to support a finding of violation of §924(c)(1). This circuit has consistently recognized the various ways that firearms may be carried in relation to a drug trafficking crime -- whether by hand, in a briefcase, or somewhere in a vehicle. Recognizing that often vehicles are used to carry both drugs and firearms, the Fifth Circuit has further defined "carry" in both the vehicle and non-vehicle contexts. *See, United States v. Pineda-Ortuno*, 952 F.2d 98 (5th Cir. 1992). In *Pineda-Ortuno*, the court held that the literal meaning of "carry" includes carriage by a vehicle, but

easy access to a firearm is not a requirement as long as the defendant knowingly carried the firearm in the vehicle and did so in relation to a drug trafficking crime. *Id.* at 104. Defendants Gray and Cleveland admitted to obtaining guns and, in the ordinary sense of the word, carried the guns in the Mazda.

C. "In relation to"

The Supreme Court has held that the "in relation to" language in §924(c)(1) "clarifies that the firearm must have some purpose or effect with respect to the drug trafficking crime; its presence or involvement cannot be the result of accident or coincidence." *Smith v. United States*, 113 S.Ct. 2050, 2059 (1993). It was no accident that there were three guns in the trunk of the Mazda. Defendants Gray and Cleveland obtained the guns for the purpose of stealing the cocaine from defendant Rodriguez and his associates. Therefore, the "in relation to" prong of the statute is met.

D. Aiding and Abetting

Defendant Gray also contends that because he was not a passenger of the vehicle in which the guns were found, he could not have been carrying them. At his sentencing hearing, defendant Gray was read the second superseding indictment that includes the charge of aiding and abetting in both counts three and five. Defendant Gray indicated at the hearing that he understood those charges. Transcript of Change of Plea Hearing, p. 8. He cannot prevail on a contention that he did not understand the charges. In any event, the evidence presented by the government showed that defendant Gray "associated himself with the venture, participated in it as in something he wished to bring about,

and sought by his actions to make it succeed." *United States v. Alvarez*, 987 F.2d 77, 83 (1st Cir. 1993). Defendant Gray cannot now prevail on a contention that his plea is not supported by the evidence simply because he was not in the car when the DEA agents detained all of the defendants.

III. Conclusion

The evidence in the case now before this court is a prime example of using a vehicle to carry firearms in relation to a drug trafficking crime. Although *Bailey* restricts the definition of "use" under §924(c)(1) and the evidence does not support defendant Gray's guilty plea for "using" a firearm, the evidence does support his guilty plea for "carrying" a firearm. Defendant Gray initiated this venture by arranging to purchase cocaine from defendant Rodriguez. Defendants Gray and Cleveland pursued their plan to steal the cocaine by obtaining guns and carrying them in the Mazda to their meeting with defendant Rodriguez. That their plan made holding the guns in their hands impractical and that vehicles are commonly used for carrying both guns and drugs only strengthen what is already sufficient evidence to support defendant Gray's guilty plea to count five of the second superseding indictment.

ORDER

For the reasons stated in the foregoing memorandum, it is ORDERED:

(1) Defendant Gray's Motion for Correction of Sentence or Other Appropriate Relief (Docket No. 175) is DENIED.

(2) Further hearing as to the form of the sentence and entry of judgment is set for 2:00 p.m. on May 21, 1996.

/S/
United States District Judge

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

CRIMINAL CASE NO. 95-10292-REK

UNITED STATES OF AMERICA

v.

JUAN RODRIGUEZ, RAMON VASQUEZ, ENRIQUE GRAY and DONALD CLEVELAND, Defendants

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Memorandum and Order
April 25, 1996

Before this court is defendant Donald Cleveland's Motion for Correction of Sentence or Other Appropriate Relief (Docket No. 181, filed January 11, 1996). Defendant Cleveland makes this motion under Federal Rule of Criminal Procedure 35(c) and, in the alternative, under 28 U.S.C. §2255.

Defendant Cleveland has already filed an appeal, as allowed under his conditional plea. This court nevertheless considers the motion now in order to inform the Clerk of the Court of Appeals of the order that this court would enter if directed by the Court of Appeals to hear and decide the motion despite the pendency of the appeal. *See, Commonwealth of Puerto Rico v. SS Zoe Colocotroni*, 601 F.2d 39, 42 (1st Cir. 1979) (when an appeal has been filed,

district court should hear the motion and report what its order would be if authorized by the Court of Appeals to hear it.)

I. Background

The relevant facts giving rise to Defendant Cleveland's arrest and guilty plea are summarized here. These facts are based on the summary of evidence presented by the government during defendant Cleveland's Change of Plea Hearing. At that hearing, defendant Cleveland agreed that he did the acts attributed to him in the summary of evidence.

Before October 18, 1994 defendant Gray arranged with defendant Rodriguez to purchase between five and eight kilograms of cocaine. Defendant Rodriguez made arrangements to get the cocaine and transport it to Boston. Defendant Gray called his friend, defendant Cleveland, in Boston to alert him to an opportunity to make some money. After arrival in Boston, defendant Gray made plans with defendant Cleveland to meet defendant Rodriguez and associates of Rodriguez and to steal some of the cocaine rather than purchase it. Defendants Gray and Cleveland, "pursuant to the plan to steal it [the cocaine]," obtained weapons.

Meanwhile, agents of the Drug Enforcement Administration ("DEA agents") in Connecticut had a known drug trafficker under surveillance at an apartment complex in Rocky Hill, Connecticut. Four individuals, including defendants Rodriguez and Vasquez, were observed leaving that apartment complex. Defendant Rodriguez was driving a white Isuzu, and defendant Vasquez and the other two individuals were in a Lexus. DEA agents followed the

vehicles from Connecticut into Boston to the vicinity of Symphony Hall. The driver of the Lexus was observed talking with defendant Gray who was sitting in a white Mazda driven by defendant Cleveland. All three vehicles were eventually observed parked close together on St. Stephens Street. At this point defendant Vasquez was seen sitting in the back seat of the Mazda. The Lexus departed and defendant Gray was then observed getting into the Isuzu with defendant Rodriguez. Both vehicles then attempted to leave the area. The DEA agents stopped and detained all of the defendants and searched both vehicles. The agents confiscated six kilograms of cocaine found in a hidden compartment of the Isuzu and three handguns found in the trunk of the Mazda.

On July 17, 1995 Defendant Cleveland pled guilty to counts three and four of the second superseding indictment. Under count three, defendant Cleveland was charged with attempting to possess cocaine with intent to distribute in violation of 21 U.S.C. §846, and under count four, defendant Cleveland was charged with carrying and using a firearm during and in relation to a drug trafficking crime in violation of 18 U.S.C. §924(c)(1).

On October 17, 1995 defendant Cleveland was sentenced to 120 months in prison for the offense charged in count three, and, concurrently, 60 months for the offense charged in count four, to be followed by 60 months supervised release. Defendant Cleveland's plea was conditioned upon allowance of his right to challenge on appeal the denial of his motion to suppress the evidence found in the Mazda (Docket No. 48, filed November 21, 1994; denied May 5, 1995). That appeal was filed on November 1, 1995, the day on which his final judgment was

entered.

On December 6, 1995 the Supreme Court issued an opinion in *Bailey v. United States*, 116 S.Ct. 501 (1995), in which the Court narrowed the interpretation of "use" under §924(c)(1).

Defendant Cleveland now challenges the sentence imposed on him at the October 17, 1995 hearing and contends that the factual basis for his guilty plea to count four did not constitute a crime under the new interpretation of §924(c)(1) announced in *Bailey*.

II.

A. Procedural Posture of the Motion

Defendant Cleveland cannot now obtain relief under Federal Rule of Criminal Procedure 35(c) because a motion under that rule must be made within seven days after the imposition of sentence. Seven days had elapsed long before defendant filed the pending motion on January 11, 1996.

As explained below, however, defendant Cleveland may proceed under 28 U.S.C. §2255. For this reason, his present motion will be considered by this court, under procedures consistent with *SS Zoe Colocotroni*.

It is the practice of the Clerk of this Court to treat a motion under §2255 as a new civil proceeding. I conclude that defendant Cleveland's filing of the pending motion, and the Clerk's receiving and filing it, as part of his original criminal case do not create any impediment to this court's consideration of the motion on the merits.

B. Retroactive Application of Substantive Law

In *Sanabria v. United States*, 916 F.Supp. 106 (D.P.R. 1996), the new rule of substantive law announced in *Bailey* was applied retroactively to Sanabria's conviction for a violation of §924(c)(1). Similarly, it is appropriate to apply the *Bailey* rule retroactively to defendant Cleveland's guilty plea. Such a retroactive application is consistent with the Supreme Court's approach in *Davis v. United States*, 417 U.S. 333 (1974), where, under a subsequent change in the substantive law, Davis could not be lawfully convicted and the Court found that "Davis' conviction and punishment [were] for an act that the law does not make criminal...[and t]here can be no room for doubt that such a circumstance 'inherently results in a complete miscarriage of justice' and 'present[s] exceptional circumstances' that justify collateral relief under §2255." *Id.* at 346-347; *See also, United States v. Fletcher*, -- F.Supp. -- (D. Kan. 1996), 1996 WL 109782, 3 (3/5/96) (noting cases in which courts have applied *Bailey* retroactively in response to §2255 motions where sentences were imposed based on defendants' guilty pleas). Defendant Cleveland's motion is therefore appropriately before this court, for this court to consider whether defendant's guilty plea and sentence were for "an act that the law does not make criminal" because of the change announced in *Bailey*.

C. Interpretation of §924(c)(1) under *Bailey v. United States*

Before the decision announced in *Bailey v. United States*, convictions for "use" under §924(c)(1) were upheld in this circuit where a firearm was simply present for the protection of drugs for sale. *See, United States v. McFadden*,

13 F.3d 463 (1st Cir. 1994) (presence of an unloaded gun between mattress and boxspring in defendant's apartment is sufficient evidence for "use" of a firearm in violation of §924(c)(1) under "fortress" theory). In *Bailey*, a unanimous Court rejected application of the statute on the basis of a "fortress" theory and held that in order to support a finding of "use" under §924(c)(1), the evidence must be "sufficient to show an active employment of the firearm by the defendant, a use that makes the firearm an operative factor in relation to the predicate offense." *Bailey*, 116 S.Ct. at 505. The Court stated that active employment includes, "brandishing, displaying, bartering, striking with, and most obviously, firing or attempting to fire, a firearm." *Id.* at 508.

Defendant Cleveland asserts that under this new interpretation his guilty plea to count four is not supported by sufficient facts and therefore his sentence for the violation in count four should be vacated. The government contends that there is no basis on which to vacate defendant Cleveland's sentence because he was also indicted for and pled guilty to "carrying" a firearm in violation of §924(c)(1) and a sufficient factual basis exists to support his guilty plea.

Under the definition of "use" announced in *Bailey*, there is no evidence in this case that defendant Cleveland ever "used" a firearm in relation to drug trafficking. But, in *Bailey* the Court explicitly did not address whether there was evidence sufficient to convict the defendant of "carrying" a firearm in violation of §924(c)(1). Bailey's conviction was based on evidence of a loaded pistol that was found in a bag in the trunk of his car. *Id.* at 504. The Court remanded the case for the Court of Appeals for the District of Columbia Circuit to consider whether there was a basis for upholding the conviction under the "carry" prong of the statute. *Id.* at

509.

Although the Court in *Bailey* interpreted only the "use" prong of §924(c)(1), its approach to analyzing the statute, as well as First Circuit cases before *Bailey*, are instructive.

D. Carrying a Firearm in Violation of §924(c)(1)

Section 924(c)(1) states in relevant part:

> Whoever, during and in relation to any...drug trafficking crime...uses or carries a firearm, shall, in addition to the punishment provided for such...drug trafficking crime, be sentenced to imprisonment for five years.

In order to support a finding of violation of §924(c)(1) the evidence must show that 1) a defendant either used or carried a firearm and 2) that it was in relation to drug trafficking activity. *See, United States v. Wight*, 968 F.2d 1393, 1396 (1st Cir. 1992). Because the evidence on which defendant Cleveland pled guilty is not enough to support a conviction for the "use" prong of §924(c)(1), as it was interpreted in *Bailey*, defendant Cleveland's plea to count four of the second superseding indictment can stand only if the evidence on which he pled guilty is sufficient to show that he "carried" a firearm "in relation to" drug trafficking activity.

The Court in *Bailey* states that Congress would have used the word "possess" if it had meant for possession of a firearm to constitute a violation of §924(c)(1). *Id.* at 506. For that reason, "carry" must mean more than mere

possession of a firearm. *See also, United States v. Plummer*, 964 F.2d 1251 (1st Cir. 1992) (mere possession of a gun during the course of criminal conduct will not support a conviction). In addition, if a word is not explicitly defined by statute, it should be given its ordinary meaning. *See, United States v. Manning*, -- F.3d -- (1st Cir. 1996), 1996 WL 116990 (3/21/96), *citing, Smith v. United States*, 113 S.Ct. 2050, 2054 (1993) (noting that words not defined by statute should be given their ordinary or common meaning). The Random House Dictionary of the English Language, Second Edition (1987), defines "carry" as follows: "to take or support from one place to another; convey; transport."

Defendant Cleveland contends that, after the decision announced in *Bailey*, "carry" must be interpreted to mean "on or about the defendant's person." Some circuits have required a showing that a firearm has been on or about the defendant's person in order to support liability under the "carry" prong of §924(c)(1). *See e.g., United States v. Hernandez*, -- F.3d -- (9th Cir. 1996), 1996 WL 34822 (1/31/96) (gun found inside a locked toolbox during the drug trafficking crime was not "carried" under §924(c)(1)); *and, United States v. White*, -- F.3d -- , (8th Cir. 1996), 1996 WL 154228 (4/4/96) (court upheld defendant's conviction for "carrying" a firearm where gun was found under coat discarded by the defendant during flight from police). But, other circuits have required only that a firearm be accessible. *See e.g., United States v. Feliz-Cordero*, 859 F.2d 250, 253 (2nd Cir. 1988) (a firearm is carried if it was "within reach during the commission of the drug offense"). Since the decision in *Bailey* was announced, no circuit has decided whether evidence of guns found in a bag in a locked trunk, along with evidence that the guns were acquired and transported for use in relation to the drug trafficking crime, is

sufficient to support a conviction for "carrying" a firearm in violation of §924(c)(1). *See e.g., United States v. Baker*, 78 F.3d 1241, 1247 (7th Cir. 1996) (court explicitly stated that its decision did not state an opinion "on whether a defendant who has drugs and a fully operable and loaded gun locked in the trunk of his car could be convicted under §924(c)(1) for carrying a firearm"). In fact, consideration of the same issue was left to the Court of Appeals for the District of Columbia Circuit when the Supreme Court remanded *Bailey*.

I conclude that I cannot sustain defendant Cleveland's contention that "[i]n this Circuit, a §924(c)(1) conviction for carrying has required that the weapon be immediately accessible." Defendant Cleveland's Memorandum in Support of Motion for Correction of Sentence (Docket No. 182), p.5. In both cases cited by defendant Cleveland for this proposition, the court was addressing the "in relation to" requirement of the statute and did not make a decision about the requirement for which Cleveland cites them. *See, United States v. Plummer*, 964 F.2d 1251, 1253-1254 (1st Cir. 1992) ("Defendant conceded that the presence of the gun in his vehicle was sufficient to establish ... that he 'carried a firearm' [citations omitted]. Defendant argues, however, that the evidence was insufficient to establish...that he carried the gun 'in relation to'..."); *and, United States v. Payero*, 888 F.2d 928, 929 (1st Cir. 1989) (where "[t]he only issue on appeal was whether the trial court correctly and adequately instructed the jury with respect to the 'during and in relation to' element [of] the statute").

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Before *Bailey*, courts in this circuit did not clearly distinguish between "use" and "carry" under §924(c)(1). But, convictions for violations under §924(c)(1) were upheld where a firearm was found in a vehicle, but was not necessarily accessible to the defendant. In those cases the focus was on the "facilitative nexus" between the possession of the firearm and its role in the criminal activity. *See, United States v. Castro-Lara*, 970 F.2d 976, 983 (1st Cir. 1992); *and, United States v. Reyes-Mercado*, 22 F.3d 363 (1st Cir. 1994).

In *Castro-Lara*, the case most closely analogous to the one before this court, an unloaded firearm and live ammunition were found in a briefcase in the locked trunk of

the defendant's car. Authorities apprehended the defendants when they were about to drive off carrying cocaine that they picked up at an airstrip. The court in *Castro-Lara* focused on the location of the firearm ("at the place where drugs were to be delivered") and the defendant's timing (the defendant "brought the gun to the airstrip in the course of taking delivery of...cocaine") in affirming the defendant's conviction. *Castro-Lara*, 970 F.2d at 983. The court held that the evidence was sufficient to show that the gun was "available for use in connection with the narcotics trade", rejected any requirement that the gun be on the defendant's person, and did not hold "instant availability" to be the critical concern. *Id.* The court in *Castro-Lara* also noted First Circuit cases in which a firearm found in a defendant's vehicle, but not on his person, was sufficient to support a conviction under §924(c)(1). *Id.* The focus in those cases has been to distinguish from "mere possession", but not require that a defendant have actively employed a firearm. Although the interpretation of §924(c)(1) in *Bailey* creates a requirement for "active employment" when there is an indictment for "use", the Court made it clear that "carry" must be given a distinct and separate meaning. *Bailey*, 116 S.Ct. at 507.

The analysis in *Castro-Lara* is in accord with the Court's emphasis in *Bailey* on congressional intent that "require[s] more than possession to trigger the statute's application". *Id.* In *Bailey*, the Court decided what "more" means when there is an indictment for "use", but not when there is an indictment for "carry". The evidence is this case indicates that defendants Cleveland and Gray did more than merely possess the three guns. During the afternoon of October 18, 1994 defendants Cleveland and Gray planned to steal the cocaine, obtained guns that were placed in a bag in

the trunk of the Mazda, and then transported the guns to the meeting with defendants Rodriguez and Vasquez. As in *Castro-Lara*, both the location of the guns (in the car they were using in their drug trafficking scheme) and defendant Cleveland's and defendant Gray's timing (obtaining the guns in order to steal the cocaine) indicates that defendants Cleveland and Gray controlled the guns and that the guns facilitated their attempt to possess cocaine. By their own admissions the guns had a central role in their scheme to possess some, if not all, of the cocaine being transported in the Isuzu.

The First Circuit cases cited above contrast with defendant Cleveland's contention that there is a requirement in this circuit that a firearm be on or about the defendant's person in order to support a finding of violation of §924(c)(1). This circuit has consistently recognized the various ways that firearms may be carried in relation to a drug trafficking crime -- whether by hand, in a briefcase, or somewhere in a vehicle. Recognizing that often vehicles are used to carry both drugs and firearms, the Fifth Circuit has further defined "carry" in both the vehicle and non-vehicle contexts. *See, United States v. Pineda-Ortuno*, 952 F.2d 98 (5th Cir. 1992). In *Pineda-Ortuno*, the court held that the literal meaning of "carry" includes carriage by a vehicle, but easy access to a firearm is not a requirement as long as the defendant knowingly carried the firearm in the vehicle and did so in relation to a drug trafficking crime. *Id.* at 104. Defendants Cleveland and Gray admitted to obtaining the guns and, in the ordinary sense of the word, carried the guns in the Mazda.

E. "In relation to"

The Supreme Court has held that the "in relation to" language in §924(c)(1) "clarifies that the firearm must have some purpose or effect with respect to the drug trafficking crime; its presence or involvement cannot be the result of accident or coincidence." *Smith v. United States*, 113 S.Ct. 2050, 2059 (1993). It was no accident that there were three guns in the trunk of the Mazda. Defendants Cleveland and Gray obtained the guns for the purpose of stealing the cocaine from defendant Rodriguez and his associates. Therefore, the "in relation to" prong of the statute is met.

III. Conclusion

The evidence in the case now before this court is a prime example of using a vehicle to carry firearms in relation to a drug trafficking crime. Although *Bailey* restricts the definition of "use" under §924(c)(1) and the evidence does not support defendant Cleveland's guilty plea for "using" a firearm, the evidence does support his guilty plea for "carrying" a firearm. Defendant Cleveland drove the vehicle in which he and defendant Gray carried the guns in relation to their attempt to possess cocaine. That their plan made holding the guns impractical and that vehicles are commonly used for carrying both guns and drugs, only strengthen what is already sufficient evidence to support defendant Cleveland's guilty plea to count four of the second superseding indictment.

ORDER

For the reasons stated in the foregoing memorandum, it is ORDERED:

(1) Defendant Cleveland's Motion for Correction of Sentence or Other Appropriate Relief (Docket No. 181) is DENIED.

(2) The Clerk will deliver forthwith, to the Clerk of the Court of Appeals, a copy of this Memorandum and Order.

/S/
United States District Judge

No. 96-8837

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1996

DONALD E. CLEVELAND and
ENRIQUE GRAY-SANTANA, PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether a firearm that is transported in a vehicle must also be within the defendant's immediate reach in order to be "carried" within the meaning of 18 U.S.C. 924(c).

IN THE SUPREME COURT OF THE UNITED STATES

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-28a) is reported at 106 F.3d 1056. The opinions of the district court (Pet. App. 29a-41a, 42a-55a) are unreported.

JURISDICTION

The judgment of the court of appeals was entered on February 18, 1997. The petition for a writ of certiorari was filed on April 30, 1997. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following the entry of guilty pleas in the United States District Court for the District of Massachusetts, petitioners

Cleveland and Gray-Santana were each convicted on one count of attempting to possess cocaine with intent to distribute it, in violation of 21 U.S.C. 846, and one count of using or carrying a firearm during and in relation to a drug trafficking crime, in violation of 18 U.S.C. 924(c). Petitioners were each sentenced to a total of 180 months' imprisonment, to be followed by five years' supervised release. The court of appeals affirmed. Pet. App. 1a-28a.

1. Petitioners Cleveland and Gray-Santana were charged, along with Juan Rodriguez and Ramon Vasquez, in a five-count indictment with various narcotics and weapons offenses. At petitioners' respective plea hearings, the government presented a summary of its evidence that established the following facts, in which petitioners concurred.

Before October 18, 1994, petitioner Gray-Santana agreed with Rodriguez to purchase between five and eight kilograms of cocaine. Rodriguez arranged to procure the cocaine and transport it to Boston. Petitioners Gray-Santana and Cleveland then formulated a plan to steal some of the cocaine from Rodriguez, rather than purchase it. Pursuant to their plan to steal the cocaine, petitioners obtained weapons. Pet. App. 30a, 43a.

In the meantime, agents of the Drug Enforcement Administration (DEA) were conducting surveillance of a known drug trafficker at an apartment complex in Connecticut. The agents observed four individuals, including Rodriguez and Vasquez, leaving the complex. Rodriguez drove a white Isuzu, and Vasquez and two others drove a

Lexus. The DEA agents followed the four men to Boston, where they observed the driver of the Lexus talking with Gray-Santana, who was sitting in a white Mazda driven by Cleveland. All three vehicles were later observed parked close together on St. Stephens Street in Boston. At that time, Vasquez was sitting in the back of the Mazda, and Gray-Santana was in the Isuzu with Rodriguez. As the vehicles attempted to leave the area, the DEA agents stopped and searched both the Mazda and the Isuzu. Six kilograms of cocaine were found in a hidden compartment of the Isuzu, and three handguns were found in the trunk of the Mazda. Pet. App. 30a-31a, 43a-44a.

2. Petitioners Cleveland and Gray-Santana entered guilty pleas, respectively, on July 17, 1995, and July 21, 1995. Pet. App. 31a, 44a. After this Court decided Bailey v. United States, 116 S. Ct. 501 (1995), each petitioner sought relief from his Section 924(c) conviction. On January 11, 1996, after he had filed a notice of appeal from his final judgment of conviction, petitioner Cleveland filed a Motion for Correction of Sentence or Other Appropriate Relief, pursuant to Fed. R. Crim. P. 35(c) and 28 U.S.C. 2255. Pet. App. 42a. Petitioner Gray-Santana filed a similar motion on December 8, 1995, after he had been sentenced but before a final judgment of conviction was entered. Id. at 29a. Petitioner Gray-Santana also sought to withdraw his plea. Ibid.

The district court held that, in light of Bailey, petitioners' Section 924(c) convictions could not be sustained under the "use" prong of the statute. Pet. App. 32a-33a, 46a-47a. The court found, however, that the dictionary definition of "carry" reached

petitioners' conduct of transporting firearms in a vehicle. Id. at 34a, 49a. The court rejected petitioners' contentions that First Circuit authority required that the weapon be immediately accessible to the defendant in order to sustain a conviction for "carrying" it. Id. at 35a-36a, 50a-51a. Instead, the court found that the evidence in the case was "a prime example of using a vehicle to carry firearms in relation to a drug trafficking crime," and it denied petitioners' motions. Id. at 40a, 54a.

3. The court of appeals affirmed. Pet. App. 1a-28a. At the outset, the court agreed that petitioners' convictions could not be sustained under the "use" prong of Section 924(c) after Bailey, as there was no evidence that the firearms had been actively employed. Pet. App. 19a. The court held, however, that petitioners had "carried" the firearms within the meaning of Section 924(c).

The court of appeals reasoned that a firearm can be "carried" in a vehicle, as well as on a suspect's person. Pet. App. 20a. The court also held, in agreement with several other circuits, that a firearm transported in a vehicle need not be immediately accessible to the defendant in order to be "carried" under Section 924(c). Id. at 21a. After considering the ordinary meaning of "carry," the court found that the term "clearly includes the transport of a firearm by car; the concept of whether or not the carried item is within reach plays no part in the definition." Id at 23a. The court recognized that in some circumstances, "a firearm's immediate accessibility to a defendant might be relevant to determining whether or not he was carrying it 'during and in

relation to' a drug trafficking crime," but concluded that that statutory element was satisfied in this case. Id. at 25a. Finally, the court analyzed the decisions of the Second, Sixth, and Ninth Circuits -- which have held that immediate accessibility is required under the "carry" prong -- and concluded that the reasoning of those courts was "unpersuasive." Id. at 26a.[1/]

ARGUMENT

Petitioners contend (Pet. 6-17) that this Court should grant review to resolve the conflict in the circuits on the question whether a conviction under Section 924(c) for "carrying" a firearm in a vehicle requires proof that the firearm was immediately accessible to the defendant. The court of appeals in this case correctly held that immediate accessibility is not required, and the conflict identified by petitioners does not warrant further review at this time.

1. a. Because Section 924(c) does not define "carry," the term must be interpreted "in accord with its ordinary or natural meaning." Smith v. United States, 508 U.S. 223, 228 (1993) (analyzing "use" prong of Section 924(c)). The court of appeals in this case correctly determined that carrying refers simply to the act of transporting an object, and that its plain meaning does not include the limitation that the carried object be "immediately accessible."

1/ The court also rejected petitioners' challenges to the district court's denial of their suppression motions. Pet. App. 14a-18a. Those issues are not presented for review in this Court.

The primary definition of "carry" supplied by Webster's Third New International Dictionary 343 (1976) (emphasis added) is:

> to move while supporting (as in a vehicle or in one's hands or arms); move an appreciable distance without dragging; sustain as a burden or load and bring along to another place.

Indeed, the word "carry" derives from the French "carier," which means "to transport in a vehicle." See ibid. The dictionary employed by this Court in Bailey v. United States, 116 S. Ct. 501, 506 (1995), and Smith offers an even more expansive definition of "carry":

> To convey, or transport, while supporting, originally in a cart or car, hence in any manner; to bear; to transfer; to transmit, to take.

Webster's New International Dictionary of the English Language 412 (2d ed. 1958). In short, to carry an object means to transport it. Although it is frequently true that a carried object is immediately accessible, the ordinary meaning of the verb does not necessarily require that element.

As the Fifth Circuit has cogently explained in a case involving the carrying of a firearm in a vehicle:

> Those cases * * * that would seem to suggest that for there to be a "carrying" the weapons must be located within such proximity so as to make them immediately available for use are distinguishable. The cases requiring "easy reach" are the result of judicial expansions of the definition of "carrying" in a nonvehicle context. When a vehicle is used, "carrying" takes on a different meaning from carrying on the person because the means of carrying is the vehicle itself.

United States v. Pineda-Ortuno, 952 F.2d 98, 104 (5th Cir.) (citations omitted), cert. denied, 504 U.S. 928 (1992). Several other circuits agree that "when a motor vehicle is used, 'carrying a weapon' takes on a less restrictive meaning than carrying on the

person. The means of carrying is the vehicle, itself, rather than the defendant's hands or pocket." United States v. Cardenas, 864 F.2d 1528, 1535-36 (10th Cir.) (footnote omitted), cert. denied, 491 U.S. 909 (1989); accord United States v. Freisinger, 937 F.2d 383, 387 & n.4 (8th Cir. 1991) (agreeing with Cardenas reasoning and affirming Section 924(c) conviction where firearms found in passenger compartment of car); United States v. Farris, 77 F.3d 391, 395 (11th Cir.) (same), cert. denied, 117 S. Ct. 241 (1996).

Petitioners' reliance (Pet. 19) on the definition of the specific phrase "to carry arms or weapons," is misplaced.[2/] First, Section 924(c) does not use that precise language. Second, that definition would restrict "carrying" to situations in which the firearm is physically worn on the defendant's person or in his clothing. As the court of appeals recognized, no circuit has held that the term "carry" is so limited. See Pet. App. 24a. Instead, every circuit to consider the question has recognized that a firearm may be "carried" in a vehicle. And as the above-cited definitions demonstrate, such a "carrying" takes place whenever a firearm is transported; the element of immediate accessibility plays no part in the ordinary definition of "carry."[3/]

2/ Black's Law Dictionary defines that phrase to mean: "To wear, bear, or carry them upon the person or in the clothing or in a pocket." Black's Law Dictionary 214 (6th ed. 1990).

3/ The location of the firearm in a vehicle and its accessibility to the defendant may be relevant in assessing whether the firearm was carried "in relation to" the drug crime. See Pet. App. 25a; United States v. Miller, 84 F.3d 1244, 1260 (10th Cir.) ("[t]o establish th[e] nexus" required by the "during and in relation to" element of Section 924(c), court may consider (continued...)

b. Contrary to petitioners' assertion (Pet. 21-23), the court of appeals' interpretation of "carrying" does not conflict with the reasoning in Bailey. Bailey concerned only the "use" prong of Section 924(c). To the extent that Bailey addressed the meaning of the term "carry," the Court merely made clear that "carry" had a meaning independent of "use," because Congress intended each prong of Section 924(c) "to have a particular, nonsuperfluous meaning." 116 S. Ct. at 507. Thus, the Court explained, under the "active employment" definition it adopted,

> a firearm can be used without being carried, e.g., when an offender has a gun on display during a transaction, or barters with a firearm without handling it; and a firearm can be carried without being used, e.g., when an offender keeps a gun hidden in his clothing throughout a drug transaction."

Ibid.

The decision below does not contravene that aspect of Bailey. Under the court of appeals' interpretation, "carrying" still encompasses a great many scenarios that are not also "uses." For example, the defendant who (as in this case) places a firearm in the trunk of his vehicle, then drives to another location where he consummates a drug deal in or near his car, has not "actively employed" (i.e., "used") the firearm, but he has carried it. See United States v. Miller, 84 F.3d at 1260 (rejecting requirement of "ready access" for "carrying," and noting that, under that

---

3/ (...continued)
accessibility of firearm to defendant and proximity of firearm to drugs), cert. denied, 117 S. Ct. 443 (1996). But the accessibility of the firearm in the vehicle has nothing to do with whether the firearm is carried from one place to another when the defendant moves the vehicle.

interpretation, "the 'carry' prong applies in a great many situations in which the post-Bailey definition of the 'use' prong would not").

Bailey also held that the term "use" in Section 924(c) "must connote more than mere possession of a firearm by a person who commits a drug offense," because if Congress had meant to punish mere possession, it could have so provided. 116 S. Ct. at 506. Contrary to petitioners' contention (Pet. 23), the decision below does not expand the "carry" prong to reach all acts of possession, because a defendant who carries a firearm in a vehicle has done more than passively possess it, regardless of whether he has immediate access to it. The defendant has, by definition, transported or conveyed the firearm; he has "move[d] [the firearm] an appreciable distance without dragging" it, and has "br[ought] [it] along to another place," in connection with a drug trafficking offense. Webster's Third New International Dictionary 343 (1976).4/

2. In the wake of Bailey, five circuits have agreed that a

4/ Petitioners argue implicitly that the element of immediate accessibility will somehow distinguish "carrying" a firearm from mere possession of the firearm. That reasoning turns Bailey on its head. In Bailey, the Court expressly rejected the claim that the placement of a weapon, or its "proximity and accessibility," standing alone, "amounted to something more than mere possession." 116 S. Ct. at 506. In the same vein, proximity and accessibility cannot be what distinguishes mere storage of a weapon in a vehicle from the carrying of that weapon. Instead, as the court of appeals correctly concluded, a weapon is "carried," within the plain and ordinary meaning of that term, whenever it is transported in a vehicle, regardless of its accessibility to the defendant. The active element of transportation is what distinguishes "carrying" from mere possession.

defendant who transports a firearm in a vehicle has "carried" the firearm, regardless of the weapon's accessibility. Those courts hold that vehicular "carrying" under Section 924(c) requires only two elements: "It is the possession of the firearm coupled with the affirmative act of transporting it during and in relation to a drug trafficking crime that precipitates liability under § 924(c)(1)." United States v. Molina, 102 F.3d 928, 930 (7th Cir. 1996) (citation omitted; emphasis added)[5]; see also United States v. Mitchell, 104 F.3d 649, 653 (4th Cir. 1997) ("the plain meaning of the term 'carry' * * * requires knowing possession and bearing, movement, conveyance, or transportation of the firearm in some manner"); Miller, 84 F.3d at 1259 ("the government is required to prove only that the defendant transported a firearm in a vehicle and that he had actual or constructive possession of the firearm while doing so"); United States v. Rivas, 85 F.3d 193, 195 (5th Cir.) ("the 'carrying' requirement of § 924(c) is met 'if the operator of the vehicle knowingly possesses the firearm in the vehicle during and in relation to a drug trafficking crime'" (quoting Pineda-Ortuno, 952 F.2d at 104)), cert. denied, 117 S. Ct. 593 (1996); Pet. App. 23a ("the concept of whether or not the carried item is within reach plays no part in the definition" of "carrying"). These courts have uniformly reasoned that the plain

5/ Despite the "recent and very clear" holding of Molina (United States v. Cooke, 110 F.3d 1288, 1302 (7th Cir. 1997) (Coffey, J., concurring)), a subsequent panel of the Seventh Circuit has inexplicably asserted that it remains an open question whether immediate accessibility is an element of "carrying." Id. at 1298. The discussion of the issue in Cooke was itself dicta, however. See id. at 1297.

meaning of "carry" does not, in the vehicular context, include the limitation of immediate accessibility and that nothing in Bailey requires such a limitation.[6]

The Second, Sixth, and Ninth Circuits, on the other hand, have held that a weapon must be immediately available to the defendant in order to be carried.[7] It remains to be seen, however, whether those courts will adhere to that view in the face of the growing weight of contrary authority. On June 12, 1997, the Sixth Circuit granted the government's suggestion for rehearing en banc of United States v. Malcuit, 104 F.3d 880 (1997). See App., infra, 1a. And the Ninth Circuit also appears to be giving serious consideration to rehearing the issue presented here. The government has filed a suggestion for rehearing en banc of the

6/ In addition, decisions from several other courts suggest that they may follow suit when the issue of firearm-accessibility in a vehicle is squarely presented. See, e.g., Farris, 77 F.3d at 395 (holding that jury could find weapon in glove compartment "carried" where vehicle used as drug distribution center and defendant "knew the firearm was in the automobile"); Barry, 98 F.3d 373, 377 (8th Cir. 1996) (affirming "carry" conviction where gun found in glove compartment; "Bailey does not require us to abandon" holding that "the common usage of 'carries' include[s] 'carries in a vehicle'"), cert. denied, 117 S. Ct. 1014 (1997); United States v. Freisinger, 937 F.2d at 387-388 & n.4 (finding defendant "carried" firearms found in knotted pillowcase inside plastic bag on floor of vehicle).

7/ Petitioner errs (Pet. 17) in suggesting that the Eighth Circuit and the D.C. Circuit also follow this view. The Eighth Circuit has expressly reserved the question, see United States v. Nelson, 109 F.3d 1323, 1326 (1997), though several of its cases suggest that it may endorse the majority view adopted by the First Circuit in the instant case. See note 6, supra. And in United States v. Moore, 104 F.3d 377, 380 (1997), the D.C. Circuit reversed the defendant's Section 924(c) conviction without any analysis, and upon the government's concession. The Moore opinion does not provide the basis for the government's concession, or for the court's acceptance of it.

Ninth Circuit's decision in United States v. Foster, 96 F.3d 1177 (1996) (withdrawn). The court of appeals has withdrawn its opinion in that case, and recently requested a supplemental brief from the government on the issue of the need for en banc review to reconcile the Ninth Circuit's own precedents.[8/] Although the Second Circuit has recently denied the government's suggestion for rehearing en banc of United States v. Cruz-Rojas, 101 F.3d 283 (1996), that court might be inclined to reconsider its views if the Ninth Circuit were to join the Sixth in granting rehearing. Because there is a reasonable possibility that the courts of appeals will themselves eliminate the conflict of authority, we believe that review by this Court is not warranted at this time.

8/ In United States v. Barber, 594 F.2d 1242 (9th Cir.), cert. denied, 444 U.S. 835 (1979), a pre-Bailey case, the Ninth Circuit squarely rejected the contention that "the word 'carries,' as used in [Section 924(c)], connotes only the concept of bearing the weapon upor one's person or having the gun within his immediate control." Id. at 1244. The Barber court affirmed the conviction of a defendant who was carrying a firearm in the locked glove compartment of his car during a drug offense. Id. at 1243.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

WALTER DELLINGER
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Acting Assistant Attorney General

LISA SIMOTAS
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JUNE 1997

96-8837

SUPREME COURT OF THE UNITED STATES

No.

Donald E. Cleveland
Enrique Gray-Santana
Petitioners

v.

United States of America
Respondent

MOTION TO PROCEED *IN FORMA PAUPERIS*

Petitioners Donald Cleveland and Enrique Gray-Santana respectfully move this Honorable Court to allow them to proceed *in forma pauperis* pursuant to 28 U.S.C. § 1915 and Sup. Ct. R. 39. As grounds therefor, petitioners state that they are indigent and leave was granted for them to proceed *in forma pauperis* in the United States District Court for the District of Massachusetts and the United States Court of Appeals for the First Circuit pursuant to 18 U.S.C. § 3006A.

Respectfully Submitted,

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For Donald Cleveland

April 1997

No. 96- 96-8837

IN THE
Supreme Court of the United States
OCTOBER TERM, 1996

DONALD E. CLEVELAND and ENRIQUE GRAY-SANTANA,

Petitioners,

v.

UNITED STATES OF AMERICA,

Respondent.

AFFIDAVIT OF SERVICE

I HEREBY CERTIFY that all parties required to be served, have been on this 30th day of April, 1997, in accordance with U.S. Supreme Court Rule 29.5(c), three (3) Copies of the forgoing **PETITION FOR WRIT OF CERTIORARI AND MOTION OF PROCEED *IN FORMA PAUPERIS***, by placing said copies in the U.S. Mail, first class postage prepaid, addressed as listed below,

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Washington, D.C. 20530

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for DONALD E. CLEVELAND
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(1 Copy)

Patrick S. Dwyer
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Sworn and subscribed before me this 30th day of April, 1997.

William R. Pierangeli
Notary Public
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My commission expires April 10, 1999

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No. 96-8837

DONALD E. CLEVELAND, ET AL., Petitioners,

v.

UNITED STATES OF AMERICA, Respondent.

AFFIDAVIT OF SERVICE

I, Linda Chloupek, of lawful age, being duly sworn, upon my oath state that I did, on the 29 day of JANUARY, 1998, send out, postage prepaid, from Omaha, NE, 1 package(s) containing 3 copies of the BRIEF FOR PETITIONERS

in the above entitled case. All parties required to be served have been served. Proper postage was affixed to said envelope(s) and they were plainly addressed to the following:

Robert H. Klonoff
Jones, Day, Reavis & Pogue
1450 G Street, N.W.
Washington, D.C. 20005
(202) 879-3939

Subscribed and sworn to before me this 29 day of JANUARY, 1998
I am duly authorized under the laws of the State of Nebraska
to administer oaths.

Linda Chloupek
Affiant

GENERAL NOTARY-State of Nebraska
PATRICIA C. BILLOTTE
My Comm. Exp. Nov. 24, 2000

Patricia C. Billotte
Notary Public

To be filed for:

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No. 95-3794

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

FILED
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UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

THOMAS A. MALCUIT,

Defendant-Appellant.

ORDER

BEFORE: MARTIN, Chief Judge; MERRITT, KENNEDY, NELSON, RYAN, BOGGS, NORRIS, SUHRHEINRICH, SILER, BATCHELDER, DAUGHTREY, MOORE and COLE, Circuit Judges.

It now appearing that the requisite number of judges in regular active service have voted for rehearing en banc; it is **ORDERED** that the order of June 9, 1997 is hereby withdrawn; it is further **ORDERED**, as provided in Sixth Circuit Rule 14, that the previous decision and judgment of this court are vacated, the mandate is stayed and the case is restored to the docket as a pending appeal.

It is further **ORDERED** that the appellant file a supplemental brief not later than Friday, August 22, 1997, and the appellee file a supplemental brief not later than Monday, September 22, 1997. The Clerk will schedule this case for argument as directed by the court.

ENTERED BY ORDER OF THE COURT

Leonard Green

Leonard Green, Clerk

(4)

No. 96-8837

In The

Supreme Court of the United States

October Term, 1997

DONALD E. CLEVELAND
ENRIQUE GRAY-SANTANA,

Petitioners,

v.

UNITED STATES OF AMERICA,

Respondent.

On Writ Of Certiorari
To The United States Court Of Appeals
For The First Circuit

JOINT APPENDIX

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Petition For Certiorari Filed April 30, 1997
Certiorari Granted December 12, 1997

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UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

UNITED STATES OF AMERICA	)	
	)	CRIMINAL NO. 94-10292-REK
v.	)	
JUAN RODRIGUEZ RAMON E. VASQUEZ ENRIQUE A. GRAY DONALD E. CLEVELAND	)	VIOLATIONS: 21 U.S.C. § 846 – Conspiracy 21 U.S.C. § 841(a)(1) – Possession With Intent to Distribute 21 U.S.C. § 846 – Attempt to Possess With Intent To Distribute 18 U.S.C. § 924(c)(1) – Carrying And Using A Firearm During And In Relation To A Drug Trafficking Crime 18 U.S.C. § 924(c)(1) – Carrying And Using A Firearm During And In Relation To A Drug Trafficking Crime 18 U.S.C. § 2 – Aiding And Abetting

SECOND SUPERSEDING INDICTMENT

COUNT ONE: (21 U.S.C. §846 – Conspiracy to Possess Cocaine with Intent to Distribute)

The Grand Jury charges that:

On or about October 18, 1994, in Boston, in the District of Massachusetts, in the District of Connecticut, and elsewhere

JUAN RODRIGUEZ
RAMON E. VASQUEZ
ENRIQUE A. GRAY
DONALD E. CLEVELAND

defendants herein, did knowingly and intentionally combine, conspire, confederate and agree with each other to commit an offense against the United States, namely: knowingly and intentionally to possess with intent to distribute a quantity of cocaine, a Schedule II controlled substance, in violation of Title 21, United States Code, Section 841(a)(1).

All in violation of Title 21, United States Code, Section 846.

COUNT TWO: (21 U.S.C. §841 – Possession of Cocaine with Intent to Distribute)

The Grand Jury further charges that:

On or about October 18, 1994, in Boston, in the District of Massachusetts, in the District of Connecticut, and elsewhere

JUAN RODRIGUEZ
RAMON E. VASQUEZ

defendants herein, in furtherance of the conspiracy set forth in Count One of this Indictment, did knowingly and intentionally possess with intent to distribute a quantity of cocaine, a Schedule II controlled substance, in violation of Title 21, United States Code, Section 841(a)(1).

All in violation of 21 U.S.C. § 841(a)(1) and 18 U.S.C. § 2.

COUNT THREE: **(21 U.S.C. §846 – Attempt to Possess Cocaine with Intent to Distribute)**

The Grand Jury further charges that:

On or about October 18, 1994, in Boston, in the District of Massachusetts, and elsewhere

DONALD E. CLEVELAND
ENRIQUE A. GRAY

defendants herein, did knowingly and intentionally attempt to possess with intent to distribute a quantity of cocaine, a Schedule II controlled substance, in violation of Title 21, United States Code, Section 841(a)(1).

All in violation of 21 U.S.C. § 846 and 18 U.S.C. § 2.

NOTICE OF APPLICABILITY OF 21 U.S.C. §841(b)(1)(A)(ii)

The crimes described in Counts One, Two and Three of this Indictment involved five or more kilograms of cocaine. Accordingly, Title 21, United States Code, Section 841(b)(1)(A)(ii) applies to these counts.

COUNT FOUR: **(Title 18 U.S.C. §924(c)(1) – Carrying and Using A Firearm During And In Relation To A Drug Trafficking Crime)**

The Grand Jury further charges that:

On or about October 18, 1994, in Boston, in the District of Massachusetts,

DONALD E. CLEVELAND

defendant herein, did knowingly and intentionally use and carry a firearm, to wit: a Sig Sauer, model P-220, .45 caliber pistol bearing serial number G203454; a Taurus .357 caliber magnum revolver bearing serial number HL106626; and a Taurus, model PT 92 AF, 9 millimeter pistol bearing serial number L89154, during and in relation to the drug trafficking crime alleged in Count Three of this Indictment, to wit: attempt to possess cocaine with intent to distribute, in violation of 21 U.S.C. § 846.

All in violation 18 U.S.C. § 924(c)(1) and 18 U.S.C. § 2.

COUNT FIVE: **(Title 18 U.S.C. §924(c)(1) – Carrying and Using A Firearm During And In Relation To A Drug Trafficking Crime)**

The Grand Jury further charges that:

On or about October 18, 1994, in Boston, in the District of Massachusetts,

ENRIQUE A. GRAY

defendant herein, did knowingly and intentionally use and carry a firearm, to wit: a Sig Sauer, model P-220, .45 caliber pistol bearing serial number G203454; a Taurus .357 caliber magnum revolver bearing serial number HL106626; and a Taurus, model PT 92 AF, 9 millimeter pistol bearing serial number L89154, during and in relation to the drug trafficking crime alleged in Count Three of this Indictment, to wit: attempt to possess cocaine with intent to distribute, in violation of 21 U.S.C. § 846.

All in violation 18 U.S.C. § 924(c)(1) and 18 U.S.C. § 2.

A TRUE BILL

/s/ Catherine Mancini
FOREPERSON OF THE
GRAND JURY

/s/ Illegible
ASSISTANT U.S. ATTORNEY

DISTRICT OF MASSACHUSETTS: ~~December~~, ~~1994~~ March 15, 1995, @ 1:40 p.m.

Returned into the District Court by Grand Jurors and filed.

/s/ Ruth A. Welch
DEPUTY CLERK

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS

****

UNITED STATES OF AMERICA
v.
DONALD CLEVELAND

CR-94-10292-REK

July 17, 1995
Boston, MA

****

COMPLETE TRANSCRIPT OF HEARING
BEFORE THE HONORABLE ROBERT E. KEETON

Appearances:

For the Government: Jeffrey A. Locke, Esq.

For the Defendant: John Cunha, Esq.

Court Reporter: Susan J. Lamoureux
Official Court Reporter
U.S. District Court
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Hartford, Connecticut 06103
(860) 246-0750

Proceedings recorded by mechanical stenography, transcript produced by computer-aided-transcription.

[5] THE COURT: All right. Follow along as I call your attention to the fact that in count three the Grand Jury charges that on or about October 18th, 1994 in Boston, in the District of Massachusetts and elsewhere, you and Enrique Gray did knowingly and intentionally attempt to possess with intent to distribute a quantity of cocaine, a Schedule II controlled substance, in violation of

Title 21, United States Code, Section 841(a)(1), all in violation of 21, United States Code, Section 846 and 18, United States Code, Section 2. Do you feel that you fully understand that charge against you?

THE DEFENDANT: Yes, sir.

THE COURT: And then following that is a notice [6] of applicability of 21, United States Code, Section 841(b)(1)(A)(2), calling attention to the fact that the crimes described in counts one and two which are not applicable at the present hearing, but also count three, the one that we've just talked about, involved five or more kilograms of cocaine, and accordingly Title 21, United States Code, Section 841(b)(1)(A)(2) applies to these counts. You understand that charge?

THE DEFENDANT: Yes, sir, I do, sir.

THE COURT: And then count four charges that on or about October 18th, 1994 in Boston, in the District of Massachusetts, you did knowingly and intentionally use and carry a firearm, to wit, a SIG-Sauer Model P-220 .45 caliber pistol bearing serial number G203454; a Taurus .357 caliber magnum revolver bearing serial number HL106626; and a Taurus model ET92AF nine millimeter pistol bearing serial number L89 154, during and in relation to the drug trafficking crime alleged in count three of this indictment, to wit, attempt to possess cocaine with intent to distribute in violation of 21, United States Code, Section 846, all in violation of 18, United States Code, Section 924(c)(1) and 18, United States Code, Section 2. Do you feel that you fully understand that charge?

THE DEFENDANT: Yes, I do, sir.

* * *

[12] THE COURT: All right. Now, I am going to ask the Government to summarize the evidence that would be offered against you if the case were tried.

You may be seated while that summary is given. [13] I will ask you to listen carefully to the summary because I will then want to ask you whether you agree that you did the things that are said to be your acts in the summary of the evidence.

You may proceed, Mr. Locke.

MR. LOCKE: Thank you your Honor.

Your Honor, were this case to proceed to trial, the Government would offer evidence to establish the following facts. The Government would show, your Honor, that during the early afternoon of October 18th, 1994, agents from the Drug Enforcement Administration as well as local police departments that were tasked to the DEA conducted an investigation in the State of Connecticut, focusing on an apartment complex in Rocky Hill, Connecticut, where they were conducting a long-term cocaine trafficking investigation of an individual named Juan Pagan. During the course of that investigation they observed several vehicles arrive at that apartment complex, containing individuals later determined to include a William Acosta, Ramon Vasquez, and a Juan Rodriguez. Continuing with their surveillance, they observed Mr. Vasquez and Rodriguez leave with yet another individual in an automobile. At the same time they observed Mr. Acosta associating with the suspected drug trafficker, Juan Pagan. After a passage of approximately [14] an

hour and 20 minutes or thereabouts, agents observed Vasquez and Rodriguez return to the apartment complex. Mr. Rodriguez at that time was driving a white Isuzu Trooper.

The Government would show, your Honor, that agents had previously received information about Jaun Pagan's use of a white Isuzu Trooper to transport and conceal cocaine, and had also determined and through information that there was a compartment inside that vehicle.

The Government would show, your Honor, that shortly after the return of Mr. Rodriguez with the white Trooper, Mr. Acosta departed Mr. Pagan's apartment, came downstairs, met with Vasquez and Rodriguez and then proceeded to drive to Boston.

The Government would show that Acosta's common law wife, Mr. Vasquez rode in one automobile and drove primarily in tandem with Mr. Rodriguez who was driving this white Isuzu Trooper. The Government would further show that the vehicles were followed ultimately from Connecticut to Boston and to the Symphony Hall section of Boston where the two vehicles stopped on St. Stephen's Street.

The Government would show, your Honor, that agents then observed activities by Mr. Vasquez and [15] Mr. Rodriguez consistent with efforts to observe whether or not they were being observed or detected by law enforcement agents. Surveillance agents in Boston then observed a Mazda automobile, Mazda 929 4-door sedan, in the vicinity of Symphony Hall with two occupants. The driver of that car was Mr. Cleveland, this defendant,

Donald Cleveland. The passenger was Enrique Gray. Agents observed Mr. Cleveland and Mr. Gray conversing first with William Acosta, the individual who traveled from Connecticut. Ultimately agents observed Gray and Cleveland get back into the Mazda and proceed to follow Mr. Acosta around Symphony Hall in the direction of St. Stephen's Street. Shortly thereafter agents again observed the Mazda, still with Mr. Cleveland driving it, Mr. Gray as a passenger and at this time observed Ramon Vasquez, the individual from Connecticut, now in the rear seat of that Mazda. They then observed the Mazda stop in the vicinity of the white Isuzu Trooper and observed Mr. Gray get out of the I – get out of the Mazda, walk up to the Trooper, attempt to open the door, which was locked, and then return to the Mazda. Shortly thereafter, after some conversation between Gray and the people in the Mazda, being Mr. Cleveland and Vasquez, Gray returned towards the Trooper. At this time he was observed waving towards Juan Rodriguez, who was now coming down St. [16] Stephens Street the other way. The evidence would show that Mr. Gray and Rodriguez ultimately met at the Trooper, exchanged greetings, and got into that vehicle and then with Rodriguez driving pulled that vehicle up behind the Mazda. All of these activities were observed by surveillance agents.

The vehicles were stopped shortly after that as they attempted to leave the area, the Symphony hall area, on St. Stephens Street, and a search was conducted of the Isuzu Trooper. In the rear of the Isuzu Trooper agents discovered in a hidden compartment under the rear seat six separately bundled packages, which were later, upon chemical analysis, determined to contain 6,003.5 grams of

89 percent pure cocaine. After the search of the Trooper and the discovery of that cocaine, agents then searched the Mazda that Mr. Cleveland had been operating and determined it to be a rental vehicle rented in a name other than Mr. Cleveland's. Upon opening the trunk, they found a Louis Vuitton bag. Inside that bag agents observed a role of duct tape. They also observed a role or a length of rope, and they also observed three firearms. The firearms, your Honor, were all loaded in some fashion and were found to consist of the following weapons: One was a .357 Magnum Taurus revolver, serial number HL106626. That weapon had three .357 Magnum [17] caliber live cartridges in the revolver. Secondly, they observed a .45 caliber SIG-Sauer Model P-220 semiautomatic pistol with a black holster. That weapon contained – had in a magazine seven live cartridges. And finally, your Honor, the third weapon was a nine millimeter caliber Taurus model PT92AF, again a semiautomatic pistol with a serial number L89154. That had a magazine with 14 live rounds or cartridges. All three weapons, your Honor, were subsequently submitted to the Department of the Commonwealth of Massachusetts State Police ballistics laboratory where, upon specialized examination, they were all found to be operable firearms in and capable of discharging the cartridges.

After the discovery of the drugs and then the weapons, your Honor, all defendants were formally placed under arrest and taken to the DEA offices in Boston. Upon arrival there, and after being given rights, Mr. Cleveland indicated that he desired to speak to agents. In particular, he spoke to Agent Bruce Travers of DEA. Mr. Cleveland, after executing waivers of his right

to counsel, and his right to remain silent, first spoke to the agents and then wrote out a handwritten statement. The substance of Mr. Cleveland's statement, which would qualify as a confession, was that on October 17th he received a telephone call from Enrique Gray, Mr. Gray [18] indicating that he wanted to come to Boston and, quote, conduct some business the following day.

Mr. Cleveland stated that on October 18th he received a call from Mr. Gray. He met with Mr. Gray. Mr. Gray told him that he had ordered up six kilograms of cocaine from an individual who was described as a Juan and a Ramon, those individuals being Juan Rodriguez and Ramon Vasquez. Mr. Cleveland said that in discussing this proposed pickup of six kilograms of cocaine from Vasquez and Rodriguez, they discussed stealing or ripping off that quantity of cocaine. And for that purpose they assembled the three weapons, placed them in a Louis Vuitton bag, put the bag together with duct tape and rope in the car and after getting a message by beeper at approximately 4:00 p.m., they traveled to the Symphony Hall area of Boston for the purposes of meeting Vasquez and Rodriguez and making arrangements to receive the cocaine.

According to Mr. Cleveland, he and Gray agreed that they would not purchase cocaine, but in fact would steal the cocaine. The plan was to take Rodriguez and Gray – excuse me – Rodriguez, Vasquez, and anyone else, that being Willy Acosta, to a nearby hotel where they would tie them up, tape them, and then steal the cocaine.

Your Honor, the Government would also note that the tape and rope was found in the same container and in [19] close proximity to those three loaded weapons.

Your Honor, that, in essence, would be the evidence the Government would offer during the course of trial.

Thank you.

THE COURT: Thank you.

Mr. Cleveland, have you heard and understood the summary of the evidence that would be offered against you if the case were tried?

THE DEFENDANT: May I have a second?

THE COURT: Yes, you may.

(Pause.)

THE DEFENDANT: Your Honor, the question again? I'm sorry. Could you repeat your question again?

THE COURT: Yes. Have you heard and understood the summary of the evidence that would be offered against you if the case were tried?

THE DEFENDANT: Yes, I did, sir. I heard.

THE COURT: Do you agree that you did the things that were said to be your acts in the course of that summary?

THE DEFENDANT: I agree I did most of the things, but some of it, it's not true.

THE COURT: I'm sorry?

THE DEFENDANT: I said agree that I did most of [20] the things in that, but some of it is not true in any statement, sir.

THE COURT: Well, I need to be a little more – need you to be a little more precise than that, because before I make a determination that it's appropriate for me to accept your change of plea, I need to have from you an acknowledgment that you did enough of those things to constitute –

THE DEFENDANT: Yes, I acknowledge that.

THE COURT: – the admission of the elements of the crime. So, if you want to tell me in your own words what it is that you're not agreeing to, I'll let you do it that way. If you –

THE DEFENDANT: I agree that I did most of the things.

MR. CUNHA: There were a couple of things that – in its statement, Judge that he felt were not accurate, and perhaps it would just be better if he articulated those things on the record.

THE COURT: That's fine. You may do that.

THE DEFENDANT: First of all, on the record, Mr. Locke states that we got out of the car and spoke with Mr. Acosta. I never left the car. Enrique Gray, he never left the car and spoke with Mr. Acosta at all. He spoke real quick. It was not a long time at all.

[21] THE COURT: All right.

THE DEFENDANT: Secondly, the statement I made, the statement at the police station to the officer

there, DEA officer there, I did a lot of it out of fear and Mr. Enrique Gray never spoke to me about how much cocaine or whether it was cocaine or not. He said it was just business he wanted to go on between me and him. It wasn't a determined amount.

THE COURT: All right. Now, earlier this morning on your behalf your counsel filed a reservation of rights under a conditional plea. You understand the document I'm talking about?

THE DEFENDANT: Yes, I do, sir.

THE COURT: Have you gone over that document with your counsel?

THE DEFENDANT: Yes, I have, sir.

THE COURT: All right. Now, subject to that reservation, which I accept, and without objection by the Government, have you voluntarily reached a decision that you want to plead guilty to the charges against you in counts three and four?

THE DEFENDANT: Yes, I have, sir.

THE COURT: Do you believe you are guilty of those charges?

THE DEFENDANT: Yes, sir.

* * *

THE CLERK: Donald E. Cleveland, on Criminal Number 94-10292-K, on counts three and four of a five count second superseding indictment you have previously pled not guilty. Do you now wish to change your plea?

THE DEFENDANT: Yes, I do.

[23] THE CLERK: What say you now as to count three; guilty or not guilty?

THE DEFENDANT: Guilty, ma'am.

THE CLERK: As to count four; guilty or not guilty?

THE DEFENDANT: Guilty, ma'am.

THE COURT: All right. The pleas will be entered. You may be seated.

* * *

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

UNITED STATES OF AMERICA	:	Criminal
V.	:	No. 94-10292-REK
ENRIQUE A. GRAY	:	

Courtroom No. 11 Federal Building Boston, MA 02109 2:20 p.m., Friday July 21, 1995

Before: THE HONORABLE ROBERT E. KEETON
UNITED STATES DISTRICT COURT JUDGE

Change of Plea

Marie L. Cloonan
Federal Court Reporter
1690 U.S.P.O. & Courthouse
Boston, MA 02109 – 426-7086
Mechanical Steno – Transcript by Computer

APPEARANCES:

OFFICE OF THE UNITED STATES ATTORNEY,
(by Jeffrey A. Locke, Esquire),
1003 U.S.P.O. & Courthouse, Boston, MA 02109,
on behalf of the Government.

ZALKIND, RODRIGUEZ, LUNT & DUNCAN,
(by Norman S. Zalkind, Esquire),
65A Atlantic Avenue, Boston, MA 02110,
on behalf of the Defendant.

* * *

[6] THE COURT: Did you also go over Counts 3 and 5 of this second superseding indictment with your attorney?

THE DEFENDANT: Yes, we did.

THE COURT: Do you feel that you fully understand the charges that are made against you in these two counts?

THE DEFENDANT: Yes, I do.

THE COURT: Now, you understand that Count 3 is a charge under 21 United States Code, Section 846 charging an attempt to possess cocaine with intent to distribute, charging that on or about October 18th, 1994, in Boston, in the District of Massachusetts, and elsewhere, you and Donald Cleveland did knowingly and intentionally attempt to possess [7] with intent to distribute a quantity of cocaine, a Schedule II controlled substance, in violation of 21 United States Code, Section 841(a)(1), all in violation of 21 United States Code, Section 846 and 18 United States Code, Section 2, that latter statute being the aiding and abetting statute. You understand that?

THE DEFENDANT: Yes, sir.

THE COURT: Now, also, following that count in the indictment is a notice of applicability of 21 United States Code, Section 841(b)(1)(A)(2), saying that the crimes described in other counts and in Count 3 of this indictment involved five or more kilograms of cocaine and, accordingly, the notice states 21 United States Code,

Section 841(b)(1)(A)(2) applies to Count 3. You understand that notice?

MR. ZALKIND: He understand [sic] the notice, your Honor. He's not agreeing that it's that amount.

THE COURT: Yes. I'm not asking about that at this time.

You understand –

THE DEFENDANT: Yes.

THE COURT: – the notice that –

THE DEFENDANT: Yeah, I just noticed that just when he said, too.

THE COURT: All right.

[8] All right. Now, Count 4 – Count 5 is a charge under Title 18 United States Code, Section 924(c)(1) concerning carrying and using a firearm during and in relation to a drug trafficking crime. And it charges that on or about October 18th, 1994, in Boston, in the District of Massachusetts, you did knowingly and intentionally use and carry a firearm, to wit: a Sig Sauer Model P220 .45-caliber pistol, bearing Serial No. G203454; a Taurus .357-caliber Magnum revolver, bearing Serial No. HL106626; and a Taurus Model PT92AF nine-millimeter pistol, bearing Serial No. L89154, during and in relation to the drug trafficking crime alleged in Count 3 of this indictment, to wit: attempt to possess cocaine with intent to distribute, in violation of 21 United States Code, Section 846, all in violation of 18 United States Code, Section 924(c)(1) and 18 United States Code, Section 2.

Do you feel you fully understand that charge against you?

THE DEFENDANT: Yes, I do.

* * *

[21] THE COURT: All right.

Now, I am going to ask Mr. Locke to summarize the evidence that would be offered against you if the case were tried, and I will want to ask you to listen carefully to [22] that summary because I will then want to ask you if you agree that you did the things that are said in that summary letter to be your act. You may be seated while this summary is given.

Mr. Locke.

MR. LOCKE: Your Honor, may it please the Court, were this matter to proceed to trial, the government would offer evidence relating to events occurring primarily on October 18 of 1994 in Connecticut and in Massachusetts and in New York as well.

Your Honor, the government would show first that in the fall of 1994, the Drug Enforcement Administration in Connecticut was conducting a drug investigation focusing on the activities of a suspected cocaine trafficker named Juan Pagon and had focused on an apartment complex that Pagon was related to and that that was located in Rocky Hill, Connecticut.

And the government would show that on or about – on October 18, 1994, the Drug Enforcement Administration had established a surveillance on that apartment

complex and that surveillance included the use of video surveillance.

That on October 18th, both agents observed and recorded through video surveillance the arrival of two other individuals, a Ramon Vasquez and Juan Rodriquez, and that those two men arrived in separate vehicles. Mr. Vasquez was [23] accompanying a male named William Acosta and a woman associated with Mr. Acosta, and that they were followed into that complex by Juan Rodriquez who was driving a separate vehicle.

The agents observed Mr. Acosta and his female associate go inside Pagon's or apartment building in what was later determined Pagon's apartment. And that Rodriquez and Vasquez waited outside some period of time until they were joined by Acosta. And at his direction both Vasquez and Rodriquez got into a second vehicle and left the Rocky Hill complex with an individual who at that time was unknown, was later determined to be an associate of Mr. Pagon.

Approximately an hour and 15 to an hour and 20 minutes later, Pagon's associate and Vasquez returned to the apartment complex in a vehicle followed by Juan Rodriquez, who at this time was driving a white Isuzu Trooper. That vehicle was known to DEA Agents in Connecticut through information that they had received that that was a vehicle owned and controlled by Mr. Pagon and used to convey drugs and/or drug proceeds in a concealed compartment located in the passenger area of that vehicle.

Shortly after Vasquez and Rodriquez returned to the complex, Acosta came out, and Mr. Acosta, his female

associate and Mr. Vasquez then left in Acosta's automobile, [24] left the apartment complex, followed by Rodriquez in the Isuzu Trooper.

They traveled, your Honor, under surveillance by DEA, from Rocky Hill, Connecticut, up Route 91, and then into Massachusetts, and onto Route 90, that being the Mass. Pike, in Springfield, Massachusetts. And ultimately, the two vehicles were followed to the Symphony Hall area of Boston.

The government would show that DEA Agents both from Connecticut and in Boston established a surveillance in the Symphony Hall area and observed Rodriquez and Acosta both travel onto St. Stephens Street in Boston.

They observed Rodriquez then meet with Vasquez in the area of Symphony Hall and proceed to establish what appeared to be a lookout, either looking for other individuals or looking for possible law enforcement surveillance.

The government would show that Mr. Acosta drove around the area and was observed to meet with this defendant, Enrique Gray. Enrique Gray was together with another co-defendant, Donald Cleveland, and they were in a white Mazda sedan, a Mazda 929 automobile, that was later determined to have been rented by an unknown individual from a Budget Rent-A-Car service.

The government would show, your Honor, that after [25] Acosta spoke with Gray and Cleveland, that Gray and Cleveland, in the Mazda, proceeded to follow Mr. Acosta around the area, around the block of Symphony Hall, ultimately traveling themselves onto St. Stephens Street.

At that time DEA Agents observed Ramon Vasquez in the rear seat of the Mazda. Mr. Gray was in the front passenger seat. Mr. Cleveland was driving.

That vehicle stopped on St. Stephens Street, and shortly after stopping, agents observed Gray get out of the Mazda and proceed to walk back up the street and walk to the white Isuzu Trooper that Rodriquez had earlier parked on the street. Gray attempted to open the passenger door, was unsuccessful. Apparently it was locked. He then walked back to the Mazda and got inside briefly. Then got out again and walked back towards the Trooper.

At this time, seeing Mr. Rodriquez who was approaching from the other direction, and after acknowledging one another with some sort of hand signals or waves, the two men met at the Isuzu Trooper.

At that time Rodriquez got in the driver's side. Mr. Gray was able then to get into the passenger side of that vehicle. And after several minutes that Isuzu Trooper pulled up behind the Mazda, both vehicles apparently preparing to leave the area.

At that time DEA Agents stopped the two vehicles, [26] removed the occupants, subsequently searched the Trooper and found in a concealed compartment in the rear passenger area some six kilogram packages of what appeared to be cocaine and what was later submitted for full analysis. And the six packages contained a total net weight of six thousand and three point five grams of 89 percent pure cocaine.

After finding that cocaine, agents placed all the individuals formally under arrest and conducted a search of the Mazda 929 sedan, in the trunk of which they found a Louis Vitton bag. And in that bag found three loaded firearms.

They found first, your Honor, a nine-millimeter caliber Taurus Model P292AF semiautomatic pistol with a Searial [sic] Number L89154. That weapon had a magazine with 14 live cartridges in it.

They found as well a .45-caliber automatic Sig Sauer Model P220 semiautomatic pistol, Serial No. G203454. That weapon was also loaded with seven live rounds inside a cartridge.

Thirdly, they found a .357 Magnum caliber Taurus revolver, Serial No. HL106626. That had three live caliber – live cartridges in the cylinder of that revolver.

They also found at that time, your Honor, some duct tape and a rope in the trunk of that Mazda automobile.

Thereafter, Mr. Gray was questioned by law [27] enforcement agents. As the Court well knows there was prior hearings. That questioning occurred at approximately 11:00 p.m. on October 18. And at that time Mr. Gray told the agents that he was familiar with Mr. Vasquez and Mr. Rodriquez. That he had negotiated with Juan Rodriquez for the delivery of five to eight kilograms of cocaine in Boston. That Mr. Rodriquez told him that he would have it available on October 18, that he would have to go to Connecticut to get it and that he would

meet this defendant, Gray, in Boston and would communicate with him by means of beeper devices when he was on his way with that cocaine.

Mr. Gray further said that he only intended to receive one kilogram of cocaine and also stated that he, upon arrival in Boston, contacted Donald Cleveland and communicated the possibility of doing – quote, doing some business in Boston with Mr. Cleveland.

That business, by agreement between Gray and Cleveland, involved a plan to steal cocaine from Mr. Rodriquez and Mr. Vasquez and any other partner that they might have in Boston.

Pursuant to that plan to steal it, weapons were obtained. Mr. Gray indicated that he had met a man earlier that afternoon who had a nine-millimeter Taurus semiautomatic handgun that Mr. Gray intended to purchase with monies obtained as a result of receiving the cocaine or [28] stealing the cocaine from Vasquez and Rodriquez.

Mr. Gray further acknowledged that at about four o'clock that afternoon he received a message on his pager from Rodriquez and pursuant to that message communicated with Rodriquez and went to the Symphony Hall area of Boston, driven by Cleveland, for the purpose of rendezvousing with Rodriquez and Vasquez and arranging the transfer of cocaine.

According to Mr. Gray – or strike that.

Your Honor, Mr. Gray then indicated that he did, in fact, go to that location and did meet up with Rodriquez and Vasquez.

The government would also offer evidence, your Honor, that among the possessions of Mr. Gray and Mr. Vasquez, Rodriquez and Cleveland were various telephone numbers that permitted the communication by and between various defendants. In particular, Mr. Gray had telephone numbers for Mr. Vasquez, as well as Mr. Cleveland, as well as for a restaurant in New York that Mr. Rodriquez associated with, that being called Vanilia Restaurant in upper Manhattan, New York.

The government would also show, your Honor, that all defendants possessed and carried during the course of their event – their activities on October 18 various beepers and cellular telephones that permitted communication by and between all the parties.

[29] That, in essence, your Honor, would be the evidence the government would offer at trial.

THE COURT: Mr. Gray, have you heard and understood the summary of the evidence that Mr. Locke has stated?

THE DEFENDANT: Yes.

THE COURT: Do you agree that you did the things that were said to be your acts in that summary?

THE DEFENDANT: Yes.

THE COURT: All right.

Now, before I accept your plea, I want to be satisfied that you believe you are guilty subject to the reservation with respect to the matters on which you've reserved the right to appeal and that you,re doing this voluntarily.

Do you believe you are guilty of these two offenses?

THE DEFENDANT: Yes.

* * *

[30] THE CLERK: Enrique Gray, on Criminal No. 94-10292-K, on Counts 3 and 5 of a five-count second superseding indictment, you previously pled not guilty. Do you now wish to change your plea?

THE DEFENDANT: Yes.

[31] THE CLERK: What say you now as to Count 3, guilty or not guilty?

THE DEFENDANT: Guilty.

THE CLERK: As to Count 5, guilty or not guilty?

THE DEFENDANT: Guilty.

THE COURT: All right.

The pleas of guilty will be entered. You may be seated.

* * *

UNITED STATES DISTRICT COURT
District of Massachusetts

UNITED STATES OF AMERICA

v.

Donald Cleveland

JUDGMENT IN A CRIMINAL CASE
(For Offenses Committed On or After November 1, 1987)

Case Number:
1:94CR10292-004

John H. Cunha, Jr., Esq.
11/1/95
Defendant's Attorney

THE DEFENDANT:

[X] pleaded guilty to count(s) SS3 and SS4
[ ] pleaded nolo contendere to count(s) _____ which was accepted by the court.

[ ] was found guilty on count(s) _____ after a plea of not guilty.

Title & Section	Nature of Offense	Date Offense Concluded	Count Number(s)
21 U.S.C. § 846	Possession of cocaine with intent to distribute	10/18/1994	SS3
18 U.S.C. § 924(c)(1)	Carrying and using a firearm during and in relation to a drug trafficking crime	10/18/1994	SS4

The defendant is sentenced as provided in pages 2 through 6 of this judgment. The sentence is imposed pursuant to the Sentencing Reform Act of 1984.

[ ] The defendant has been found not guilty on count(s) _____

[X] Count(s) SS1 is dismissed on the motion of the United States.

IT IS FURTHER ORDERED that the defendant shall notify the United States attorney for this district within 30 days of any change of name, residence, or mailing address until all fines, restitution, costs, and special assessments imposed by this judgment are fully paid.

Defendant's Soc. Sec. No.: 024-50-7323	10/17/1995 Date of Imposition of Judgment
Defendant's Date of Birth: 08/10/1964	/s/ Robert E. Keeton Signature of Judicial Officer
Defendant's USM No.: 20338-038	Robert E. Keeton United States District Judge Name & Title of Judicial Officer
Defendant's Residence Address: One Howland Street Dorchester, MA 02121	November 1, 1995 Date
Defendant's Mailing Address: One Howland Street Dorchester, MA 02121	

IMPRISONMENT

The defendant is hereby committed to the custody of the United States Bureau of Prisons to be imprisoned for a total term of 180 month(s).

120 months on Count 3 of the second superseding indictment, and 60 months on Count 4 of the second superseding indictment, consecutive to the term in custody under Count 3.

Credit for time in custody since date of arrest, October 18, 1994.

[ ] The court makes the following recommendations to the Bureau of Prisons:

[X] The defendant is remanded to the custody of the United States Marshal.

[ ] The defendant shall surrender to the United States Marshal for this district:

  [ ] at ___ a.m./p.m. on ___.
  [ ] as notified by the United States Marshal.

[ ] The defendant shall surrender for service of sentence at the institution designated by the Bureau of Prisons:

  [ ] before 2 p.m. on _____.
  [ ] as notified by the United States Marshal.
  [ ] as notified by the Probation or Pretrial Services Office.

RETURN

I have executed this judgment as follows:

_____

_____

_____

Defendant delivered on 12-20-95 to FCL-RBK at _____, with a certified copy of this judgment.

/s/ W.S. Keller Warden
UNITED STATES MARSHAL

By /s/ Illegible
Deputy U.S. Marshal

SUPERVISED RELEASE

Upon release from imprisonment, the defendant shall be on supervised release for a term of 60 month(s).

The defendant shall report to the probation office in the district to which the defendant is released within 72 hours of release from the custody of the Bureau of Prisons.

The defendant shall not commit another federal, state, or local crime.

The defendant shall not illegally possess a controlled substance.

For offenses committed on or after September 13, 1994:

The defendant shall refrain from any unlawful use of a controlled substance. The defendant shall submit to one drug test within 15 days of release from imprisonment and at least two periodic drug tests thereafter, as directed by the probation officer.

[ ] The above drug testing condition is suspended based on the court's determination that the defendant poses a low risk of future substance abuse. (Check, if applicable.)

[ ] The defendant shall not possess a firearm as defined in 18 U.S.C. § 921. (Check, if applicable.)

If this judgment imposes a fine or a restitution obligation, it shall be a condition of supervised release that the defendant pay any such fine or restitution that remains unpaid at the commencement of the term of supervised release in accordance with the Schedule of Payments set forth in the Criminal Monetary Penalties sheet of this judgment.

The defendant shall comply with the standard conditions that have been adopted by this court (set forth below). The defendant shall also comply with the additional conditions on the attached page (if indicated below).

STANDARD CONDITIONS OF SUPERVISION

1) the defendant shall not leave the judicial district without the permission of the court or probation officer;

2) the defendant shall report to the probation officer and shall submit a truthful and complete written report within the first five days of each month;

3) the defendant shall answer truthfully all inquiries by the probation officer and follow the instructions of the probation officer;

4) the defendant shall support his or her dependents and meet other family responsibilities;

5) the defendant shall work regularly at a lawful occupation unless excused by the probation officer for schooling, training, other acceptable reasons;

6) the defendant shall notify the probation officer ten days prior to any change in residence or employment;

7) the defendant shall refrain from excessive use of alcohol;

8) the defendant shall not frequent places where controlled substances are illegally sold, used, distributed, or administered;

9) the defendant shall not associate with any persons engaged in criminal activity, and shall not associate with any person convicted of a felony unless granted permission to do so by the probation officer;

10) the defendant shall permit a probation officer to visit him or her at any time at home or elsewhere and shall permit confiscation of any contraband observed in plain view of the probation officer;

11) the defendant shall notify the probation officer within seventy-two hours of being arrested or questioned by a law enforcement officer;

12) the defendant shall not enter into any agreement to act as an informer or a special agent of a law enforcement agency without the permission of the court;

13) as directed by the probation officer, the defendant shall notify third parties of risks that may be occasioned by the defendant's criminal record or personal history or characteristics, and shall permit the probation officer to make such notifications and to confirm the defendant's compliance with such notification requirement.

CRIMINAL MONETARY PENALTIES

The defendant shall pay the following total criminal monetary penalties in accordance with the schedule of payments set forth on Sheet 5, Part B.

	Assessment	Fine	Restitution
Totals:	$ 100.00	$	$

[ ] If applicable, restitution amount ordered pursuant to plea agreement .... $ _____

Special assessment of $50.00 on each of second superseding counts 3 and 4 for a total of $100.00.

FINE

The above fine includes costs of incarceration and/or supervision in the amount of $ _____.

The defendant shall pay interest on any fine of more than $2,500, unless the fine is paid in full before the fifteenth day after the date of judgment, pursuant to 18 U.S.C. § 3612(f). All of the payment options on Sheet 5, Part B may be subject to penalties for default and delinquency pursuant to 18 U.S.C. § 3612(g).

[ ] The court determined that the defendant does not have the ability to pay interest and it is ordered that:

  [ ] The interest requirement is waived.
  [ ] The interest requirement is modified as follows:

RESTITUTION

[ ] The determination of restitution is deferred in a case brought under Chapters 109A, 110, 110A and 113A of Title 18 for offenses committed on or after 09/13/1994, until _____. An Amended Judgment in a Criminal Case will be entered after such determination.

[ ] The defendant shall make restitution to the following payees in the amounts listed below.

If the defendant makes a partial payment, each payee shall receive an approximately proportional payment unless specified otherwise in the priority order or percentage payment column below.

Name of Payee	**Total Amount of Loss	Amount of Restitution Ordered	Priority Order Percentage of Payment
Totals:	$_____	$_____	

** Findings for the total amount of losses are required under Chapters 109A, 110, 110A, and 113A of Title 18 for offenses committed on or after September 13, 1994.

SCHEDULE OF PAYMENTS

Payments shall be applied in the following order: (1) assessment; (2) restitution; (3) fine principal; (4) cost of prosecution; (5) interest; (6) penalties.

Payment of the total fine and other criminal monetary penalties shall be due as follows:

A [X] in full immediately; or

B [ ] $_____ immediately, balance due (in accordance with C, D, or E); or

C [ ] not later than _____; or

D [ ] in installments to commence ___ day(s) after the date of this judgment. In the event the entire amount of criminal monetary penalties imposed is not paid prior to the commencement of supervision, the U.S. probation officer shall pursue collection of the amount due, and shall request the court to establish a payment schedule if appropriate; or

E [ ] in _____ (*e.g. equal, weekly, monthly, quarterly*) installments of $ _____ over a period of ___ year(s) to commence ___ day(s) after the date of this judgment.

The National Fine Center will credit the defendant for all payments previously made toward any criminal monetary penalties imposed. Special instructions regarding the payment of criminal monetary penalties:

[ ] The defendant shall pay the costs of prosecution.

[ ] The defendant shall forfeit the defendant's interest in the following property to the United States:

Unless the court has expressly ordered otherwise in the special instructions above, if this judgment imposes a period of imprisonment payment of criminal monetary penalties shall be due during the period of imprisonment. All criminal monetary penalty payments are to be made to the United States Courts National Fine Center, Administrative Office of the United States Courts, Washington, DC 20544, except those payments made through the

Bureau of Prisons' Inmate Financial Responsibility Program. If the National Fine Center is not operating in this district, all criminal monetary penalty payments are to be made as directed by the court, the probation officer, or the United States attorney.

STATEMENT OF REASONS

[X] The court adopts the factual findings and guideline application in the presentence report.

OR

[ ] The court adopts the factual findings and guideline application in the presentence report except (see attachment, if necessary):

Guideline Range Determined by the Court:

Total Offense Level: 29+

Criminal History Category: III

Imprisonment Range: 120 to 135 months

Supervised Release Range: 5 to 5 years

Fine Range: $ 15,000.00 to $ 4,500,000.00

[X] Fine waived or below the guideline range because of inability to pay.

Total Amount of Restitution: $ _____

[ ] Restitution is not ordered because the complication and prolongation of the sentencing process resulting from the fashioning of a restitution order outweighs the need to provide restitution to any victims, pursuant to 18 U.S.C. § 3663(d).

[ ] For offenses that require the total amount of loss to be stated, pursuant to Chapters 109A, 110, 110A, and 113A of Title 18, restitution is not ordered because the economic circumstances of the defendant do not allow the payment of any amount of a restitution order, and do not allow for the payment of any or some portion of a restitution order in the foreseeable future under any reasonable schedule of payments.

[ ] Partial restitution is ordered for the following reason(s):

[X] The sentence is within the guideline range, that range does not exceed 24 months, and the court finds no reason to depart from the sentence called for by the application of the guidelines.

OR

[ ] The sentence is within the guideline range, that range exceeds 24 months, and the sentence is imposed for the following reason(s):

OR

[ ] The sentence departs from the guideline range:

[ ] upon motion of the government, as a result of defendant's substantial assistance.

[ ] for the following specific reason(s):

_____

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

UNITED STATES OF AMERICA	)	
	)	CRIMINAL NO.
V.	)	94-10292-004-REK
	)	
DONALD CLEVELAND	)	
	)	
	)	

NOTICE OF APPEAL
November 1, 1995

KEETON, D.J.

Now comes the defendant, DONALD CLEVELAND, and hereby appeals from the Judgment and Commitment Order this date.

By the Court:

By: /s/ Joanne M. Cull
Joanne M. Cull
Deputy Clerk

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

UNITED STATES	)	
	)	CRIMINAL NO.
V.	)	94-10292-REK
	)	
JUAN RODRIGUEZ, RAMON VASQUEZ, ENRIQUE GRAY and DONALD CLEVELAND	)	
	)	
	)	
	)	

MOTION FOR CORRECTION OF SENTENCE
OR OTHER APPROPRIATE RELIEF

Defendant Enrique Gray respectfully moves for correction of sentence pursuant to Fed. R. Crim. P. 35(c), or other appropriate relief. As grounds therefor, defendant states:

1. The defendant pled guilty to a charge of carrying and using a firearm during and in relation to a drug trafficking crime, 18 U.S.C. §924(c)(1).

2. This plea was grounded in evidence that a gun was found in the trunk of a car that the defendant admited he had been in.

3. The Supreme Court, in *Bailey v. United States*, 1995 WL 712269, *5 (12/6/95), Justice O'Connor, for a unanimous court, held that liability attaches under 18 U.S.C. §924(c)(1) only for actual use, not simply intended use. No such actual use was alleged or proven in the case of Enrique Gray.

4. Because the facts articulated and admitted to cannot sustain a conviction under 18 U.S.C. §924(c)(1), the defendant moves that his sentence be vacated, as it is now shown to be in clear error of law.

The defendant requests that he be permitted to further brief this issue, and be allowed one week to prepare said brief.

Respectfully submitted,

ENRIQUE GRAY

/s/ Norman Zalkind
Norman S. Zalkind
BBO # 538880
ZALKIND, RODRIGUEZ,
LUNT & DUNCAN
65a Atlantic Avenue
Boston, MA 02110
742-6020

December 8, 1995

I certify that I have this day caused to be served by United States Mail, postage prepaid, a copy of this document on all counsel of record.

/s/ Illegible

UNITED STATES DISTRICT COURT
FOR THE
DISTRICT OF MASSACHUSETTS

UNITED STATES OF AMERICA	)	
	)	CR NO.
V.	)	94-10292-REK
	)	
DONALD CLEVELAND	)	
	)	

MOTION FOR CORRECTION OF SENTENCE
OR OTHER APPROPRIATE RELIEF

Defendant Donald Cleveland respectfully moves for correction of sentence pursuant to Fed. R. Crim. P. 35(c) and 28 U.S.C. § 2255, or other appropriate relief. As grounds therefore, defendant states:

1. The defendant pled guilty to a charge of carrying and using a firearm during and in relation to a drug trafficking crime, 18 U.S.C. § 924(c)(1).

2. This plea was grounded in evidence that a gun was found in the trunk of a car that the defendant admitted he had been in.

3. The Supreme Court, in *Bailey v. United States*, 1995 WL 712269, *5 (12/6/95), Justice O'Connor, for a unanimous court, held that liability attaches under 18 U.S.C. § 924(c)(1) only for actual use, not simply intended use. No such actual use was alleged or proven in the case of Donald Cleveland.

4. Because the facts articulated and admitted to cannot sustain a conviction under 18 U.S.C. § 924(c)(1), the defendant moves that his sentence be vacated, as it is now shown to be in clear error of law.

The defendant's Memorandum of Law accompanies this motion.

DONALD CLEVELAND
By his attorney,

John H. Cunha Jr.
B.B.O. No. 108580
SALSBERG & CUNHA
20 Winthrop Square
Boston, MA 02110-1274
(617) 338-1590

Date: January 11, 1996

CERTIFICATE OF SERVICE

I certify that on this day I served a copy of this motion by first class mail, postage pre-paid, to counsel of record for all parties.

John H. Cunha Jr.

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

UNITED STATES OF AMERICA V. JUAN RODRIGUEZ, RAMON VASQUEZ, ENRIQUE GRAY and DONALD CLEVELAND, Defendants	CRIMINAL CASE No. 94-10292-REK

Memorandum and Order
April 25, 1996

Before this court is defendant Enrique Gray's Motion for Correction of Sentence or Other Appropriate Relief (Docket No. 175, filed December 8, 1995). Defendant Gray makes this motion under Federal Rule of Criminal Procedure 35(c) and, in the alternative, under 28 U.S.C. §2255, and he also seeks to withdraw his plea.

Because a final judgment in this case has not yet been entered as a defendant Gray, the court treats the pending motion as a motion to reconsider sentencing, and, in the alternative, to withdraw his plea. In any event, whatever the most appropriate procedural label may be, I conclude that it is appropriate to decide defendant Gray's challenge to the sentence on the merits.

I. Background

The relevant facts giving rise to Defendant Gray's arrest and guilty plea are summarized here. These facts are based on the summary of evidence presented by the

government during defendant Gray's Change of Plea Hearing. At that hearing, defendant Gray agreed that he did the acts attributed to him in the summary of evidence.

Before October 18, 1994 defendant Gray arranged with defendant Rodriguez to purchase between five and eight kilograms of cocaine. Defendant Rodriguez made arrangements to get the cocaine and transport it to Boston. Defendant Gray called his friend, defendant Cleveland, in Boston to alert him to an opportunity to make some money. After arrival in Boston, defendant Gray made plans with defendant Cleveland to meet defendant Rodriguez and associates of Rodriguez and to steal some of the cocaine rather than purchase it. Defendants Gray and Cleveland, "pursuant to the plan to steal it [the cocaine]," obtained weapons.

Meanwhile, agents of the Drug Enforcement Administration ("DEA agents") in Connecticut had a known drug trafficker under surveillance at an apartment complex in Rocky Hill, Connecticut. Four individuals, including defendants Rodriguez and Vasquez, were observed leaving the apartment complex. Defendant Rodriguez was driving a white Isuzu, and defendant Vasquez and the other two individuals were in a Lexus. DEA agents followed the vehicles from Connecticut into Boston to the vicinity of Symphony Hall. The driver of the Lexus was observed talking with defendant Gray who was sitting in a white Mazda driven by defendant Cleveland. All three vehicles were eventually observed parked close together on St. Stephens Street. At this point, defendant Vasquez was seen sitting in the back seat of the Mazda. The Lexus departed and defendant Gray was then observed getting

into the Isuzu with defendant Rodriguez. Both vehicles then attempted to leave the area. The DEA agents stopped and detained all of the defendants and searched both vehicles. The agents confiscated six kilograms of cocaine found in a hidden compartment of the Isuzu and three handguns found in the trunk of the Mazda.

On July 21, 1995 Defendant Gray pled guilty to counts three and five of the second superseding indictment. Under count three, defendant Gray was charged with attempting to possess cocaine with intent to distribute in violation of 21 U.S.C. §846, and under count five, defendant Gray was charged with carrying and using a firearm during and in relation to a drug trafficking crime in violation of 18 U.S.C. §924(c)(1).

On November 29, 1995 defendant Gray was sentenced to 120 months in prison for the offense charged in count three, and, concurrently, 60 months for the offense charged in count five, to be followed by 60 months supervised release.

On December 6, 1995 the Supreme Court issued an opinion in *Bailey* v. *United States*, 116 S.Ct. 501 (1995), in which the Court narrowed the interpretation of "use" under §924(c)(1).

Defendant Gray now challenges the sentence imposed on him at the November 29, 1995 hearing and contends that the factual basis for his guilty plea to count five no longer constitutes a crime under the new interpretation of §924(c)(1) announced in *Bailey*.

A. Interpretation of §924(c)(1) under *Bailey* v. *United States*

Before the decision announced in *Bailey* v. *United States*, convictions for "use" under §924(c)(1) were upheld in this circuit where a firearm was simply present for the protection of drugs for sale. *See, United States* v. *McFadden*, 13 F.3d 463 (1st Cir. 1994) (presence of an unloaded gun between mattress and boxspring in defendant's apartment is sufficient evidence for "use" of a firearm in violation of §924(c)(1) under "fortress" theory). In *Bailey*, a unanimous Court rejected application of the statute on the basis of a "fortress" theory and held that in order to support a finding of "use" under §924(c)(1), the evidence must be "sufficient to show an active employment of the firearm by the defendant, a use that makes the firearm an operative factor in relation to the predicate offense." *Bailey*, 116 S.Ct. at 505. The Court stated that active employment includes, "brandishing, displaying, bartering, striking with, and most obviously, firing or attempting to fire, a firearm." *Id.* at 508.

Defendant Gray asserts that under this new interpretation his guilty plea to count five is not supported by sufficient facts and therefore his sentence for the violation in count five should be vacated. The government contends that there is no basis on which to vacate defendant Gray's sentence because he was also indicted for and pled guilty to "carrying" a firearm in violation of §924(c)(1) and a sufficient factual basis exists to support his guilty plea.

Under the definition of "use" announced in *Bailey*, there is no evidence in this case that defendant Gray ever

"used" a firearm in relation to drug trafficking. But, in *Bailey* the Court explicitly did not address whether there was evidence sufficient to convict the defendant of "carrying" a firearm in violation of §924(c)(1). Bailey's conviction was based on evidence of a loaded pistol that was found in a bag in the trunk of his car. *Id.* at 504. The Court remanded the case for the Court of Appeals for the District of Columbia Circuit to consider whether there was a basis for upholding the conviction under the "carry" prong of the statute. *Id.* at 509.

Although the Court in *Bailey* interpreted only the "use" prong of §924(c)(1), its approach to analyzing the statute, as well as First Circuit cases before *Bailey*, are instructive.

B. Carrying a Firearm in violation of §924(c)(1)

Section 924(c)(1) states in relevant part:

> Whoever, during and in relation to any . . . drug trafficking crime . . . uses or carries a firearm, shall, in addition to the punishment provided for such . . . drug trafficking crime, be sentenced to imprisonment for five years.

In order to support a finding of violation of §924(c)(1) the evidence must show that 1) a defendant either used or carried a firearm and 2) that it was in relation to drug trafficking activity. *See, United States* v. *Wight*, 968 F.2d 1393, 1396 (1st Cir. 1992). Because the evidence on which defendant Gray pled guilty is not enough to support a conviction for the "use" prong of §924(c)(1), as it was interpreted in *Bailey*, defendant Gray's plea to count five of the second superseding indictment can stand only if

the evidence on which he pled guilty is sufficient to show that he "carried" a firearm "in relation to" drug trafficking activity.

The Court in *Bailey* states that Congress would have used the word "possess" if it had meant for possession of a firearm to constitute a violation of §924(c)(1). *Id.* at 506. For that reason, "carry" must mean more than mere possession of a firearm. *See also, United States* v. *Plummer,* 964 F.2d 1251 (1st Cir. 1992) (mere possession of a gun during the course of criminal conduct will not support a conviction). In addition, if a word is not explicitly defined by statute, it should be given its ordinary meaning. *See, United States* v. *Manning,* ___ F.3d ___ (1st Cir. 1996), 1996 WL 116990 (3/21/96), *citing, Smith* v. *United States,* 113 S.Ct. 2050, 2054 (1993) (noting that words not defined by statute should be given their ordinary or common meaning). The Random House Dictionary of the English Language, Second Edition (1987), defines "carry" as follows: "to take or support from one place to another; convey; transport."

Defendant Gray contends that, after the decision announced in *Bailey,* "carry" must be interpreted to mean "on or about the defendant's person." Some circuits have required a showing that a firearm has been on or about the defendant's person in order to support liability under the "carry" prong of §924(c)(1). *See e.g., United States* v. *Hernandez,* ___ F.3d ___ (9th Cir. 1996), 1996 WL 34822 (1/31/96) (gun found inside a locked toolbox during the drug trafficking crime was not "carried" under §924(c)(1)); *and, United States* v. *White,* ___ F.3d ___, (8th Cir. 1996), 1996 WL 154228 (3/21/96) (court upheld defendant's conviction for "carrying" a firearm where

gun was found under coat discarded by the defendant during flight from police). But, other circuits have required only that a firearm be accessible. *See e.g., United States* v. *Feliz-Cordero,* 859 F.2d 250, 253 (2nd Cir. 1988) (a firearm is carried if it was "within reach during the commission of the drug offense"). Since the decision in *Bailey* was announced, no circuit has decided whether evidence of guns found in a bag in a locked trunk, along with evidence that the guns were acquired and transported for use in relation to the drug trafficking crime, is sufficient to support a conviction for "carrying" a firearm in violation of §924(c)(1). *See e.g., United States* v. *Baker,* 78 F.3d 1241, 1247 (7th Cir. 1996) (court explicitly stated that its decision did not state an opinion "on whether a defendant who has drugs and a fully operable and loaded gun locked in the trunk of his car could be convicted under §924(c)(1) for carrying a firearm"). In fact, consideration of the same issue was left to the Court of Appeals for the District of Columbia Circuit when the Supreme Court remanded *Bailey.*

I conclude that I cannot sustain defendant Gray's contention that "[i]n this Circuit, a §924(c)(1) conviction for carrying has required that the weapon be immediately accessible." Defendant Gray's Memorandum in Support of Motion for Correction of Sentence (Docket No. 177), p.5. In both cases cited by defendant Gray for this proposition, the court was addressing the "in relation to" requirement of the statute and did not make a decision about the requirement for which defendant Gray cites them. *See, United States* v. *Plummer,* 964 F.2d 1251, 1253-1254 (1st Cir. 1992) ("Defendant conceded that the

presence of the gun in his vehicle was sufficient to establish . . . that he 'carried a firearm' [citations omitted]. Defendant argues, however, that the evidence was insufficient to establish . . . that he carried the gun 'in relation to' . . . "); *and, United States* v. *Payero,* 888 F.2d 928, 929 (1st Cir. 1989) (where "[t]he only issue on appeal was whether the trial court correctly and adequately instructed the jury with respect to the 'during and in relation to' element [of] the statute").

In the First Circuit, two cases decided since *Bailey* have addressed the scope of "carry". In *United States* v. *Manning,* ___ F.3d ___ (1st Cir. 1996), 1196 WL 116990, 2 (3/21/96), the court did not define the "precise contours" of "carry", but held that "Manning's actions me[ ]t any reasonable contours of the 'carry' prong." In *Manning,* the defendant was observed carrying a briefcase into a garage. Shortly thereafter, a police officer found the briefcase that contained cocaine, a handgun and six pipebombs. In *United States* v. *Ramirez-Ferrer,* ___ F.3d ___ (1st Cir. 1996), 1996 WL 125595, 4 (3/27/96), the court, sitting en banc, vacated the defendants' convictions under the "use" prong, but required reconsideration by the panel on the "carry" prong "since *Bailey* has both limited the word 'use' to the extent that it cannot apply in the instant case and emphasized that 'carry' has meanings not covered by 'use'." In *Ramirez-Ferrer* a loaded handgun was found covered by a t-shirt in a storage compartment near the location where one of the defendants had been sitting when the defendants' boat, in which they were transporting cocaine, was interdicted off the coast of Puerto Rico. *Id.* at 2. Both cases recognize that

the ordinary meaning of "carry" includes transporting a firearm without actually holding it.

Before *Bailey,* courts in this circuit did not clearly distinguish between "use" and "carry" under §924(c)(1). But, convictions for violations under §924(c)(1) were upheld where a firearm was found in a vehicle, but was not necessarily accessible to the defendant. In those cases the focus was on the "facilitative nexus" between the possession of the firearm and its role in the criminal activity. *See, United States* v. *Castro-Lara,* 970 F.2d 976, 983 (1st Cir. 1992); *and, United States* v. *Reves-Mercado,* 22 F.3d 363 (1st Cir. 1994).

In *Castro-Lara,* the case most closely analogous to the one before this court, an unloaded firearm and live ammunition were found in a briefcase in the locked trunk of the defendant's car. Authorities apprehended the defendants when they were about to drive off carrying cocaine that they picked up at an airstrip. The court in *Castro-Lara* focused on the location of the firearm ("at the place where drugs were to be delivered") and the defendant's timing (the defendant "brought the gun to the airstrip in the course of taking delivery of . . . cocaine") in affirming the defendant's conviction. *Castro-Lara,* 970 F.2d at 983. The court held that the evidence was sufficient to show that the gun was "available for use in connection with the narcotics trade," rejected any requirement that the gun be on the defendant's person, and did not hold "instant availability" to be the critical concern. *Id.* The court in *Castro-Lara* also noted First Circuit cases in which a firearm found in a defendant's vehicle, but not on his person, was sufficient to support a conviction under

§924(c)(1). *Id.* The focus in those cases has been to distinguish from "mere possession," but not require that a defendant have actively employed a firearm. Although the interpretation of §924(c)(1) in *Bailey* creates a requirement for "active employment" when there is an indictment for "use", the Court made it clear that "carry" must be given a distinct and separate meaning. *Bailey*, 116 S.Ct. at 507.

The analysis in *Castro-Lara* is in accord with the Court's emphasis in *Bailey* on congressional intent that "require[s] more than possession to trigger the statute's application." *Id.* In *Bailey*, the Court decided what "more" means when there is an indictment for "use", but not when there is an indictment for "carry". The evidence is this case indicates that defendants Gray and Cleveland did more than merely possess the three guns. During the afternoon of October 18, 1994 defendants Cleveland and Gray planned to steal the cocaine, obtained guns that were placed in a bag in the trunk of the Mazda, and then transported the guns to the meeting with defendants Rodriguez and Vasquez. As in *Castro-Lara*, both the location of the guns (in the car they were using in their drug trafficking scheme) and defendant Gray's and defendant Cleveland's timing (obtaining the guns in order to steal the cocaine) indicates that defendants Gray and Cleveland controlled the guns and that the guns facilitated their attempt to possess cocaine. By their own admissions the guns had a central role in their scheme to possess some, if not all, of the cocaine being transported in the Isuzu.

The First Circuit cases cited above contrast with defendant Gray's contention that there is a requirement

in this circuit that a firearm be on or about the defendant's person in order to support a finding of violation of §924(c)(1). This circuit has consistently recognized the various ways that firearms may be carried in relation to a drug trafficking crime – whether by hand, in a briefcase, or somewhere in a vehicle. Recognizing that often vehicles are used to carry both drugs and firearms, the Fifth Circuit has further defined "carry" in both the vehicle and non-vehicle contexts. *See, United States* v. *Pineda-Ortuno*, 952 F.2d 98 (5th Cir. 1992). In *Pineda-Ortuno*, the court held that the literal meaning of "carry" includes carriage by a vehicle, but easy access to a firearm is not a requirement as long as the defendant knowingly carried the firearm in the vehicle and did so in relation to a drug trafficking crime. *Id.* at 104. Defendants Gray and Cleveland admitted to obtaining guns and, in the ordinary sense of the word, carried the guns in the Mazda.

C. "In relation to"

The Supreme Court has held that the "in relation to" language in §924(c)(1) "clarifies that the firearm must have some purpose or effect with respect to the drug trafficking crime; its presence or involvement cannot be the result of accident or coincidence." *Smith* v. *United States*, 113 S.Ct. 2050, 2059 (1993). It was no accident that there were three guns in the trunk of the Mazda. Defendants Gray and Cleveland obtained the guns for the purpose of stealing the cocaine from defendant Rodriguez and his associates. Therefore, the "in relation to" prong of the statute is met.

D. Aiding and Abetting

Defendant Gray also contends that because he was not a passenger of the vehicle in which the guns were found, he could not have been carrying them. At his sentencing hearing, defendant Gray was read the second superseding indictment that includes the charge of aiding and abetting in both counts three and five. Defendant Gray indicated at the hearing that he understood those charges. Transcript of Change of Plea Hearing, p. 8. He cannot prevail on a contention that he did not understand the charges. In any event, the evidence presented by the government showed that defendant Gray "associated himself with the venture, participated in it as in something he wished to bring about, and sought by his actions to make it succeed." *United States* v. *Alvarez*, 987 F.2d 77, 83 (1st Cir. 1993). Defendant Gray cannot now prevail on a contention that his plea is not supported by the evidence simply because he was not in the car when the DEA agents detained all of the defendants.

III. Conclusion

The evidence in the case now before this court is a prime example of using a vehicle to carry firearms in relation to a drug trafficking crime. Although *Bailey* restricts the definition of "use" under §924(c)(1) and the evidence does not support defendant Gray's guilty plea for "using" a firearm, the evidence does support his guilty plea for "carrying" a firearm. Defendant Gray initiated this venture by arranging to purchase cocaine from defendant Rodriguez. Defendants Gray and Cleveland pursued their plan to steal the cocaine by obtaining guns

and carrying them in the Mazda to their meeting with defendant Rodriguez. That their plan made holding the guns in their hands impractical and that vehicles are commonly used for carrying both guns and drugs only strengthen what is already sufficient evidence to support defendant Gray's guilty plea to count five of the second superseding indictment.

ORDER

For the reasons stated in the foregoing memorandum, it is ORDERED:

(1) Defendant Gray's Motion for Correction of Sentence or Other Appropriate Relief (Docket No. 175) is DENIED.

(2) Further hearing as to the form of the sentence and entry of judgment is set for 2:00p.m. on May 21, 1996.

/s/ Robert Illegible
United States
District Judge

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

UNITED STATES OF AMERICA v. JUAN RODRIGUEZ, RAMON VASQUEZ, ENRIQUE GRAY and DONALD CLEVELAND, Defendants	CRIMINAL CASE NO. 94-10292-REK

Memorandum and Order
April 25, 1996

Before this court is defendant Donald Cleveland's Motion for Correction of Sentence or Other Appropriate Relief (Docket No. 181, filed January 11, 1996). Defendant Cleveland makes this motion under Federal Rule of Criminal Procedure 35(c) and, in the alternative, under 28 U.S.C. § 2255.

Defendant Cleveland has already filed an appeal, as allowed under his conditional plea. This court nevertheless considers the motion now in order to inform the Clerk of the Court of Appeals of the order that this court would enter if directed by the Court of Appeals to hear and decide the motion despite the pendency of the appeal. *See, Commonwealth of Puerto Rico* v. *SS Zoe Colocotroni*, 601 F.2d 39, 42 (1st Cir. 1979) (when an appeal has been filed, district court should hear the motion and report what its order would be if authorized by the Court of Appeals to hear it.)

I. Background

The relevant facts giving rise to Defendant Cleveland's arrest and guilty plea are summarized here. These facts are based on the summary of evidence presented by the government during defendant Cleveland's Change of Plea Hearing. At that hearing, defendant Cleveland agreed that he did the acts attributed to him in the summary of evidence.

Before October 18, 1994 defendant Gray arranged with defendant Rodriguez to purchase between five and eight kilograms of cocaine. Defendant Rodriguez made arrangements to get the cocaine and transport it to Boston. Defendant Gray called his friend, defendant Cleveland, in Boston to alert him to an opportunity to make some money. After arrival in Boston, defendant Gray made plans with defendant Cleveland to meet defendant Rodriguez and associates of Rodriguez and to steal some of the cocaine rather than purchase it. Defendants Gray and Cleveland, "pursuant to the plan to steal it [the cocaine]," obtained weapons.

Meanwhile, agents of the Drug Enforcement Administration ("DEA agents") in Connecticut had a known drug trafficker under surveillance at an apartment complex in Rocky Hill, Connecticut. Four individuals, including defendants Rodriguez and Vasquez, were observed leaving that apartment complex. Defendant Rodriguez was driving a white Isuzu, and defendant Vasquez and the other two individuals were in a Lexus. DEA agents followed the vehicles from Connecticut into Boston to the vicinity of Symphony Hall. The driver of the Lexus was observed talking with defendant Gray who was sitting in

a white Mazda driven by defendant Cleveland. All three vehicles were eventually observed parked close together on St. Stephens Street. At this point defendant Vasquez was seen sitting in the back seat of the Mazda. The Lexus departed and defendant Gray was then observed getting into the Isuzu with defendant Rodriguez. Both vehicles then attempted to leave the area. The DEA agents stopped and detained all of the defendants and searched both vehicles. The agents confiscated six kilograms of cocaine found in a hidden compartment of the Isuzu and three handguns found in the trunk of the Mazda.

On July 17, 1995 Defendant Cleveland pled guilty to counts three and four of the second superseding indictment. Under count three, defendant Cleveland was charged with attempting to possess cocaine with intent to distribute in violation of 21 U.S.C. § 846, and under count four, defendant Cleveland was charged with carrying and using a firearm during and in relation to a drug trafficking crime in violation of 18 U.S.C. § 924(c)(1).

On October 17, 1995 defendant Cleveland was sentenced to 120 months in prison for the offense charged in count three, and, concurrently, 60 months for the offense charged in count four, to be followed by 60 months supervised release. Defendant Cleveland's plea was conditioned upon allowance of his right to challenge on appeal the denial of his motion to suppress the evidence found in the Mazda (Docket No. 48, filed November 21, 1994; denied May 5, 1995). That appeal was filed on November 1, 1995, the day on which his final judgment was entered.

On December 6, 1995 the Supreme Court issued an opinion in *Bailey* v. *United States*, 116 S.Ct. 501 (1995), in which the Court narrowed the interpretation of "use" under § 924(c)(1).

Defendant Cleveland now challenges the sentence imposed on him at the October 17, 1995 hearing and contends that the factual basis for his guilty plea to count four did not constitute a crime under the new interpretation of § 924(c)(1) announced in *Bailey*.

II.

A. Procedural Posture of the Motion

Defendant Cleveland cannot now obtain relief under Federal Rule of Criminal Procedure 35(c) because a motion under that rule must be made within seven days after the imposition of sentence. Seven days had elapsed long before defendant filed the pending motion on January 11, 1996.

As explained below, however, defendant Cleveland may proceed under 28 U.S.C. § 2255. For this reason, his present motion will be considered by this court, under procedures consistent with *SS Zoe Colocotroni*.

It is the practice of the Clerk of this Court to treat a motion under § 2255 as a new civil proceeding. I conclude that defendant Cleveland's filing of the pending motion, and the Clerk's receiving and filing it, as part of his original criminal case do not create any impediment to this court's consideration of the motion on the merits.

B. Retroactive Application of Substantive Law

In *Sanabria* v. *United States*, 916 F.Supp. 106 (D.P.R. 1996), the new rule of substantive law announced in *Bailey* was applied retroactively to Sanabria's conviction for a violation of § 924(c)(1). Similarly, it is appropriate to apply the *Bailey* rule retroactively to defendant Cleveland's guilty plea. Such a retroactive application is consistent with the Supreme Court's approach in *Davis* v. *United States*, 417 U.S. 333 (1974), where, under a subsequent change in the substantive law, Davis could not be lawfully convicted and the Court found that "Davis' conviction and punishment [were] for an act that the law does not make criminal . . . [and t]here can be no room for doubt that such a circumstance 'inherently results in a complete miscarriage of justice' and 'present[s] exceptional circumstances' that justify collateral relief under § 2255." *Id.* at 346-347; *See also, United States* v. *Fletcher*, ___ F.Supp. ___ (D. Kan. 1996), 1996 WL 109782, 3 (3/5/96) (noting cases in which courts have applied *Bailey* retroactively in response to § 2255 motions where sentences were imposed based on defendants' guilty pleas). Defendant Cleveland's motion is therefore appropriately before this court, for this court to consider whether defendant's guilty plea and sentence were for "an act that the law does not make criminal" because of the change announced in *Bailey*.

C. Interpretation of § 924(c)(1) under *Bailey* v. *United States*

Before the decision announced in *Bailey* v. *United States*, convictions for "use" under § 924(c)(1) were

upheld in this circuit where a firearm was simply present for the protection of drugs for sale. *See, United States* v. *McFadden*, 13 F.3d 463 (1st Cir. 1994) (presence of an unloaded gun between mattress and boxspring in defendant's apartment is sufficient evidence for "use" of a firearm in violation of § 924(c)(1) under "fortress" theory). In *Bailey*, a unanimous Court rejected application of the statute on the basis of a "fortress" theory and held that in order to support a finding of "use" under § 924(c)(1), the evidence must be "sufficient to show an active employment of the firearm by the defendant, a use that makes the firearm an operative factor in relation to the predicate offense." *Bailey*, 116 S.Ct. at 505. The Court stated that active employment includes, "brandishing, displaying, bartering, striking with, and most obviously, firing or attempting to fire, a firearm." *Id.* at 508.

Defendant Cleveland asserts that under this new interpretation his guilty plea to count four is not supported by sufficient facts and therefore his sentence for the violation in count four should be vacated. The government contends that there is no basis on which to vacate defendant Cleveland's sentence because he was also indicted for and pled guilty to "carrying" a firearm in violation of § 924(c)(1) and a sufficient factual basis exists to support his guilty plea.

Under the definition of "use" announced in *Bailey*, there is no evidence in this case that defendant Cleveland ever "used" a firearm in relation to drug trafficking. But, in *Bailey* the Court explicitly did not address whether there was evidence sufficient to convict the defendant of "carrying" a firearm in violation of § 924(c)(1). Bailey's conviction was based on evidence of a loaded pistol that

was found in a bag in the trunk of his car. *Id.* at 504. The Court remanded the case for the Court of Appeals for the District of Columbia Circuit to consider whether there was a basis for upholding the conviction under the "carry" prong of the statute. *Id.* at 509.

Although the Court in *Bailey* interpreted only the "use" prong of § 924(c) (1), its approach to analyzing the statute, as well as First Circuit cases before *Bailey,* are instructive.

D. Carrying a Firearm in Violation of § 924(c)(1)

Section 924(c)(1) states in relevant part:

> Whoever, during and in relation to any . . . drug trafficking crime . . . uses or carries a firearm, shall, in addition to the punishment provided for such . . . drug trafficking crime, be sentenced to imprisonment for five years.

In order to support a finding of violation of § 924(c)(1) the evidence must show that 1) a defendant either used or carried a firearm and 2) that it was in relation to drug trafficking activity. *See, United States* v. *Wight,* 968 F.2d 1393, 1396 (1st Cir. 1992). Because the evidence on which defendant Cleveland pled guilty is not enough to support a conviction for the "use" prong of § 924(c)(1), as it was interpreted in *Bailey,* defendant Cleveland's plea to count four of the second superseding indictment can stand only if the evidence on which he pled guilty is sufficient to show that he "carried" a firearm "in relation to" drug trafficking activity.

The Court in *Bailey* states that Congress would have used the word "possess" if it had meant for possession of a firearm to constitute a violation of § 924(c)(1). *Id.* at 506. For that reason, "carry" must mean more than mere possession of a firearm. *See also, United States* v. *Plummer,* 964 F.2d 1251 (1st Cir. 1992) (mere possession of a gun during the course of criminal conduct will not support a conviction). In addition, if a word is not explicitly defined by statute, it should be given its ordinary meaning. *See, United States* v. *Manning.* ___ F.3d ___ (1st Cir. 1996), 1996 WL 116990 (3/21/96), *citing, Smith* v. *United States,* 113 S.Ct. 2050, 2054 (1993) (noting that words not defined by statute should be given their ordinary or common meaning). The Random House Dictionary of the English Language, Second Edition (1987), defines "carry" as follows: "to take or support from one place to another; convey; transport."

Defendant Cleveland contends that, after the decision announced in *Bailey,* "carry" must be interpreted to mean "on or about the defendant's person." Some circuits have required a showing that a firearm has been on or about the defendant's person in order to support liability under the "carry" prong of § 924(c)(1). *See e.g., United States* v. *Hernandez,* ___ F.3d ___ (9th Cir. 1996), 1996 WL 34822 (1/31/96) (gun found inside a locked toolbox during the drug trafficking crime was not "carried" under § 924(c)(1)); *and, United States* v. *White,* ___ F.3d ___, (8th Cir. 1996), 1996 WL 154228 (4/4/96) (court upheld defendant's conviction for "carrying" a firearm where gun was found under coat discarded by the defendant during flight from police). But, other circuits have required only that a firearm be accessible. *See e.g., United States* v. *Feliz-*

Cordero, 859 F.2d 250, 253 (2nd Cir. 1988) (a firearm is carried if it was "within reach during the commission of the drug offense"). Since the decision in *Bailey* was announced, no circuit has decided whether evidence of guns found in a bag in a locked trunk, along with evidence that the guns were acquired and transported for use in relation to the drug trafficking crime, is sufficient to support a conviction for "carrying" a firearm in violation of § 924(c)(1). *See e.g., United States* v. *Baker*, 78 F.3d 1241, 1247 (7th Cir. 1996) (court explicitly stated that its decision did not state an opinion "on whether a defendant who has drugs and a fully operable and loaded gun locked in the trunk of his car could be convicted under § 924(c)(1) for carrying a firearm"). In fact, consideration of the same issue was left to the Court of Appeals for the District of Columbia Circuit when the Supreme Court remanded *Bailey*.

I conclude that I cannot sustain defendant Cleveland's contention that "[i]n this Circuit, a § 924(c)(1) conviction for carrying has required that the weapon be immediately accessible." Defendant Cleveland's Memorandum in Support of Motion for Correction of Sentence (Docket No. 182), p.5. In both cases cited by defendant Cleveland for this proposition, the court was addressing the "in relation to" requirement of the statute and did not make a decision about the requirement for which Cleveland cites them. *See, United States* v. *Plummer*, 964 F.2d 1251, 1253-1254 (1st Cir. 1992) ("Defendant conceded that the presence of the gun in his vehicle was sufficient to establish . . . that he 'carried a firearm' [citations omitted]. Defendant argues, however, that the evidence was insufficient to establish . . . that he carried the gun 'in

relation to' . . . "); *and, United States* v. *Payero*, 888 F.2d 928, 929 (1st Cir. 1989) (where "[t]he only issue on appeal was whether the trial court correctly and adequately instructed the jury with respect to the 'during and in relation to' element [of] the statute").

In the First Circuit, two cases decided since *Bailey* have addressed the scope of "carry". In *United States* v. *Manning*, ___ F.3d ___ (1st Cir. 1996), 1996 WL 116990, 2 (3/21/96), the court did not define the "precise contours" of "carry", but held that "Manning's actions me[]t any reasonable contours of the 'carry' prong." In *Manning*, the defendant was observed carrying a briefcase into a garage. Shortly thereafter, a police officer found the briefcase that contained cocaine, a handgun and six pipebombs. In *United States* v. *Ramirez-Ferrer*, ___ F.3d ___ (1st Cir. 1996), 1996 WL 125595, 4 (3/27/96), the court, sitting en banc, vacated the defendants' convictions under the "use" prong, but required reconsideration by the panel on the "carry" prong "since *Bailey* has both limited the word 'use' to the extent that it cannot apply in the instant case and emphasized that 'carry' has meanings not covered by 'use' ". In *Ramirez-Ferrer* a loaded handgun was found covered by a t-shirt in a storage compartment near the location where one of the defendants had been sitting when the defendants' boat, in which they were transporting cocaine, was interdicted off the coast of Puerto Rico. *Id.* at 2. Both cases recognize that the ordinary meaning of "carry" includes transporting a firearm without actually holding it.

Before *Bailey*, courts in this circuit did not clearly distinguish between "use" and "carry" under § 924(c)(1). But, convictions for violations under § 924(c)(1) were

upheld where a firearm was found in a vehicle, but was not necessarily accessible to the defendant. In those cases the focus was on the "facilitative nexus" between the possession of the firearm and its role in the criminal activity. *See, United States* v. *Castro-Lara*, 970 F.2d 976, 983 (1st Cir. 1992); *and, United States* v. *Reyes-Mercado*, 22 F.3d 363 (1st Cir. 1994).

In *Castro-Lara*, the case most closely analogous to the one before this court, an unloaded firearm and live ammunition were found in a briefcase in the locked trunk of the defendant's car. Authorities apprehended the defendants when they were about to drive off carrying cocaine that they picked up at an airstrip. The court in *Castro-Lara* focused on the location of the firearm ("at the place where drugs were to be delivered") and the defendant's timing (the defendant "brought the gun to the airstrip in the course of taking delivery of . . . cocaine") in affirming the defendant's conviction. *Castro-Lara*, 970 F.2d at 983. The court held that the evidence was sufficient to show that the gun was "available for use in connection with the narcotics trade", rejected any requirement that the gun be on the defendant's person, and did not hold "instant availability" to be the critical concern. *Id.* The court in *Castro-Lara* also noted First Circuit cases in which a firearm found in a defendant's vehicle, but not on his person, was sufficient to support a conviction under § 924(c)(1). *Id.* The focus in those cases has been to distinguish from "mere possession", but not require that a defendant have actively employed a firearm. Although the interpretation of § 924(c)(1) in *Bailey* creates a requirement for "active employment" when there is an indictment for "use", the Court made it clear that "carry" must

be given a distinct and separate meaning. *Bailey*, 116 S.Ct. at 507.

The analysis in *Castro-Lara* is in accord with the Court's emphasis in *Bailey* on congressional intent that "require[s] more than possession to trigger the statute's application". *Id.* In *Bailey*, the Court decided what "more" means when there is an indictment for "use", but not when there is an indictment for "carry". The evidence is this case indicates that defendants Cleveland and Gray did more than merely possess the three guns. During the afternoon of October 18, 1994 defendants Cleveland and Gray planned to steal the cocaine, obtained guns that were placed in a bag in the trunk of the Mazda, and then transported the guns to the meeting with defendants Rodriguez and Vasquez. As in *Castro-Lara*, both the location of the guns (in the car they were using in their drug trafficking scheme) and defendant Cleveland's and defendant Gray's timing (obtaining the guns in order to steal the cocaine) indicates that defendants Cleveland and Gray controlled the guns and that the guns facilitated their attempt to possess cocaine. By their own admissions the guns had a central role in their scheme to possess some, if not all, of the cocaine being transported in the Isuzu.

The First Circuit cases cited above contrast with defendant Cleveland's contention that there is a requirement in this circuit that a firearm be on or about the defendant's person in order to support a finding of violation of § 924(c)(1). This circuit has consistently recognized the various ways that firearms may be carried in relation to a drug trafficking crime – whether by hand, in a briefcase, or somewhere in a vehicle. Recognizing that

often vehicles are used to carry both drugs and firearms, the Fifth Circuit has further defined "carry" in both the vehicle and non-vehicle contexts. *See, United States* v. *Pineda-Ortuno*, 952 F.2d 98 (5th Cir. 1992). In *Pineda-Ortuno*, the court held that the literal meaning of "carry" includes carriage by a vehicle, but easy access to a firearm is not a requirement as long as the defendant knowingly carried the firearm in the vehicle and did so in relation to a drug trafficking crime. *Id.* at 104. Defendants Cleveland and Gray admitted to obtaining the guns and, in the ordinary sense of the word, carried the guns in the Mazda.

E. "In relation to"

The Supreme Court has held that the "in relation to" language in § 924(c)(1) "clarifies that the firearm must have some purpose or effect with respect to the drug trafficking crime; its presence or involvement cannot be the result of accident or coincidence." *Smith* v. *United States*, 113 S.Ct. 2050, 2059 (1993). It was no accident that there were three guns in the trunk of the Mazda. Defendants Cleveland and Gray obtained the guns for the purpose of stealing the cocaine from defendant Rodriguez and his associates. Therefore, the "in relation to" prong of the statute is met.

III. Conclusion

The evidence in the case now before this court is a prime example of using a vehicle to carry firearms in relation to a drug trafficking crime. Although *Bailey* restricts the definition of "use" under § 924(c)(1) and the

evidence does not support defendant Cleveland's guilty plea for "using" a firearm, the evidence does support his guilty plea for "carrying" a firearm. Defendant Cleveland drove the vehicle in which he and defendant Gray carried the guns in relation to their attempt to possess cocaine. That their plan made holding the guns impractical and that vehicles are commonly used for carrying both guns and drugs, only strengthen what is already sufficient evidence to support defendant Cleveland's guilty plea to count four of the second superseding indictment.

ORDER

For the reasons stated in the foregoing memorandum, it is ORDERED:

(1) Defendant Cleveland's Motion for Correction of Sentence or Other Appropriate Relief (Docket No. 181) is DENIED.

(2) The Clerk will deliver forthwith, to the Clerk of the Court of Appeals, a copy of this Memorandum and Order.

/s/ Robert E. Keeton
United States
District Judge

UNITED STATES DISTRICT COURT
District of Massachusetts

UNITED STATES OF AMERICA

v.

ENRIQUE GRAY-SANTANA

JUDGMENT IN A CRIMINAL CASE
(For Offenses Committed On or After November 1, 1987)

Case Number:
1:94CR10292-003 REK

Norman Zalkind, Esq.
Defendant's Attorney

THE DEFENDANT:

[X] pleaded guilty to count(s) 3 and 5
[ ] pleaded nolo contendere to count(s) _____ which was accepted by the court.

[ ] was found guilty on count(s) _____ after a plea of not guilty.

Title & Section	Nature of Offense	Date Offense Concluded	Count Number(s)
21 U.S.C. § 846	Attempt to possess cocaine with intent to distribute	10/18/1994	3
18 U.S.C. § 2	Aiding and abetting	10/18/1994	3,5
18 U.S.C. § 924(c)(1)	Carrying and using a firearm during and in relation to a drug trafficking crime	10/18/1994	5

The defendant is sentenced as provided in pages 2 through 6 of this judgment. The sentence is imposed pursuant to the Sentencing Reform Act of 1984.

[ ] The defendant has been found not guilty on count(s) _____

[X] Count(s) 1 is dismissed on the motion of the United States.

IT IS FURTHER ORDERED that the defendant shall notify the United States attorney for this district within 30 days of any change of name, residence, or mailing address until all fines, restitution, costs, and special assessments imposed by this judgment are fully paid.

Defendant's Soc. Sec. No.:
054-33-4001

Defendant's Date of Birth:
05/08/1965

Defendant's USM No.:
20341-038

Defendant's Residence Address:

Boston MA 02109

Defendant's Mailing Address:

Boston MA 02109

05/21/1996
Date of Imposition of Judgment

/s/ Robert E. Keeton
Signature of Judicial Officer

Robert E. Keeton
United States District Judge
Name & Title of Judicial Officer

June 4, 1996
Date

IMPRISONMENT

The defendant is hereby committed to the custody of the United States Bureau of Prisons to be imprisoned for a total term of 120 month(s).

On Count 3. On Count 5, 60 months in the custody of the Bureau of Prisons consecutive to the period in custody under Count 3.

The defendant is to be credited with the time in custody since October 18, 1994 to the present.

[X] The court makes the following recommendations to the Bureau of Prisons:

That, if feasible, defendant be placed in a Bureau of Prisons facility in the New York City area to facilitate family visits.

[X] The defendant is remanded to the custody of the United States Marshal.

[ ] The defendant shall surrender to the United States Marshal for this district:

[ ] at ___ a.m./p.m. on ___.
[ ] as notified by the United States Marshal.

[ ] The defendant shall surrender for service of sentence at the institution designated by the Bureau of Prisons:

[ ] before 2 p.m. on _____.
[ ] as notified by the United States Marshal.
[ ] as notified by the Probation or Pretrial Services Office.

RETURN

I have executed this judgment as follows:

_____

_____

_____

Defendant delivered on _____ to _____ at _____, with a certified copy of this judgment.

_____
UNITED STATES MARSHAL

By _____
Deputy U.S. Marshal

SUPERVISED RELEASE

Upon release from imprisonment, the defendant shall be on supervised release for a term of 60 month(s).

On Count 3, to commence upon release from custody under Count 5 of this sentence. On Count 5, 60 months to be served concurrently with the period under Count 3.

The defendant shall report to the probation office in the district to which the defendant is released within 72 hours of release from the custody of the Bureau of Prisons.

The defendant shall not commit another federal, state, or local crime.

The defendant shall not illegally possess a controlled substance.

For offenses committed on or after September 13, 1994:

The defendant shall refrain from any unlawful use of a controlled substance. The defendant shall

submit to one drug test within 15 days of release from imprisonment and at least two periodic drug tests thereafter, as directed by the probation officer.

[ ] The above drug testing condition is suspended based on the court's determination that the defendant poses a low risk of future substance abuse. (Check, if applicable.)

[X] The defendant shall not possess a firearm as defined in 18 U.S.C. § 921. (Check, if applicable.)

If this judgment imposes a fine or a restitution obligation, it shall be a condition of supervised release that the defendant pay any such fine or restitution that remains unpaid at the commencement of the term of supervised release in accordance with the Schedule of Payments set forth in the Criminal Monetary Penalties sheet of this judgment.

The defendant shall comply with the standard conditions that have been adopted by this court (set forth below). The defendant shall also comply with the additional conditions on the attached page (if indicated below).

STANDARD CONDITIONS OF SUPERVISION

1) the defendant shall not leave the judicial district without the permission of the court or probation officer;

2) the defendant shall report to the probation officer and shall submit a truthful and complete written report within the first five days of each month;

3) the defendant shall answer truthfully all inquiries by the probation officer and follow the instructions of the probation officer;

4) the defendant shall support his or her dependents and meet other family responsibilities;

5) the defendant shall work regularly at a lawful occupation unless excused by the probation officer for schooling, training, or other acceptable reasons;

6) the defendant shall notify the probation officer ten days prior to any change in residence or employment;

7) the defendant shall refrain from excessive use of alcohol;

8) the defendant shall not frequent places where controlled substances are illegally sold, used, distributed, or administered;

9) the defendant shall not associate with any persons engaged in criminal activity, and shall not associate with any person convicted of a felony unless granted permission to do so by the probation officer;

10) the defendant shall permit a probation officer to visit him or her at any time at home or elsewhere and shall permit confiscation of any contraband observed in plain view of the probation officer;

11) the defendant shall notify the probation officer within seventy-two hours of being arrested or questioned by a law enforcement officer;

12) the defendant shall not enter into any agreement to act as an informer or a special agent of a law enforcement agency without the permission of the court;

13) as directed by the probation officer, the defendant shall notify third parties of risks that may be occasioned by the defendant's criminal record or personal history or characteristics, and shall permit the probation officer to make such

* * *

CRIMINAL MONETARY PENALTIES

The defendant shall pay the following total monetary penalties in accordance with the schedule of payments set forth on Sheet 5, Part B.

	Assessment	Fine	Restitution
Totals:	$ 100.00	$	$

[ ] If applicable, restitution amount ordered pursuant to plea agreement .... $ _____

FINE

The above fine includes costs of incarceration and/or supervision in the amount of $ _____.

The defendant shall pay interest on any fine of more than $2,500, unless the fine is paid in full before the fifteenth day after the date of judgment, pursuant to 18 U.S.C. § 3612(f). All of the payment options on Sheet 5, Part B may be subject to penalties for default and delinquency pursuant to 18 U.S.C. § 3612(g).

[ ] The court determined that the defendant does not have the ability to pay interest and it is ordered that:

  [ ] The interest requirement is waived.
  [ ] The interest requirement is modified as follows:

RESTITUTION

[ ] The determination of restitution is deferred in a case brought under Chapters 109A, 110, 110A and 113A of Title 18 for offenses committed on or after 09/13/1994, until _____. An Amended Judgment in a Criminal Case will be entered after such determination.

[ ] The defendant shall make restitution to the following payees in the amounts listed below.

If the defendant makes a partial payment, each payee shall receive an approximately proportional payment unless specified otherwise in the priority order or percentage payment column below.

Name of Payee	**Total Amount of Loss	Amount of Restitution Ordered	Priority Order or Percentage of Payment
Totals:	$_____	$_____	

** Findings for the total amount of losses are required under Chapters 109A, 110, 110A, and 113A of Title 18 for offenses committed on or after September 13, 1994.

SCHEDULE OF PAYMENTS

Payments shall be applied in the following order: (1) assessment; (2) restitution; (3) fine principal; (4) cost of prosecution; (5) interest; (6) penalties.

Payment of the total fine and other criminal monetary penalties shall be due as follows:

A [X] in full immediately; or

B [ ] $_____ immediately, balance due (in accordance with C, D, or E); or

C [ ] not later than _____; or

D [ ] in installments to commence ____ day(s) after the date of this judgment. In the event the entire amount of criminal monetary penalties imposed is not paid prior to the commencement of supervision, the U.S. probation officer shall pursue collection of the amount due, and shall request the court to establish a payment schedule if appropriate; or

E [ ] in _____ (*e.g. equal, weekly, monthly, quarterly*) installments of $ _____ over a period of ____ year(s) to commence ____ day(s) after the date of this judgment.

The National Fine Center will credit the defendant for all payments previously made toward any criminal monetary penalties imposed. Special instructions regarding the payment of criminal monetary penalties:

[ ] The defendant shall pay the costs of prosecution.

[ ] The defendant shall forfeit the defendant's interest in the following property to the United States:

Unless the court has expressly ordered otherwise in the special instructions above, if this judgment imposes a period of imprisonment payment of criminal monetary penalties shall be due during the period of imprisonment. All criminal monetary penalty payments are to be made to the United States Courts National Fine Center, Administrative Office of the United States Courts, Washington, DC 20544, except those payments made through the

Bureau of Prisons' Inmate Financial Responsibility Program. If the National Fine Center is not operating in this district, all criminal monetary penalty payments are to be made

* * *

STATEMENT OF REASONS

[ ] The court adopts the factual findings and guideline application in the presentence report.

OR

[X] The court adopts the factual findings and guideline application in the presentence report except (see attachment, if necessary):

See Amended Memorandum of Sentencing Hearing and Report of Statement of Reasons attached.

Guideline Range Determined by the Court:

Total Offense Level: 29

Criminal History Category: I

Imprisonment Range: 180 to 195 months

Supervised Release Range: 5 to 5 years

Fine Range: $ 15,000.00 to $ 4,250,000.00

[X] Fine waived or below the guideline range because of inability to pay.

Total Amount of Restitution: $ 0.00

[ ] Restitution is not ordered because the complication and prolongation of the sentencing process resulting from the fashioning of a

restitution order outweighs the need to provide restitution to any victims, pursuant to 18 U.S.C. § 3663(d).

[ ] For offenses that require the total amount of loss to be stated, pursuant to Chapters 109A, 110, 110A, and 113A of Title 18, restitution is not ordered because the economic circumstances of the defendant do not allow for the payment of any amount of a restitution order, and do not allow for the payment of any or some portion of a restitution order in the foreseeable future under any reasonable schedule of payments.

[ ] Partial restitution is ordered for the following reason(s):

[X] The sentence is within the guideline range, that range does not exceed 24 months, and the court finds no reason to depart from the sentence called for by the application of the guidelines.

OR

[ ] The sentence is within the guideline range, that range exceeds 24 months, and the sentence is imposed for the following reason(s):

OR

[ ] The sentence departs from the guideline range:

[ ] upon motion of the government, as a result of defendant's substantial assistance.

[ ] for the following specific reason(s):

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

UNITED STATES OF AMERICA	)	
	)	CRIMINAL NO.
V.	)	94-10292-003-REK
	)	
ENRIQUE GRAY-SANTANA	)	
	)	

NOTICE OF APPEAL
June 4, 1996

KEETON, D.J.

Now comes the defendant, Enrique Gray-Santana, and hereby appeals from the Judgment and Commitment Order this date.

By the Court:

By: /s/ Joanne M. Cull
Joanne M. Cull
Deputy Clerk

UNITED UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

UNITED STATES, Appellee v. ENRIQUE GRAY-SANTANA and DONALD CLEVELAND, Defendants-Appellants	Case Nos. 96-1659; 96-1043; 96-1669

STATEMENT OF ISSUES

1. Whether the district court erred in denying the defendants' motion to suppress evidence seized during searches of two vehicles, where law enforcement officers exceeded the scope of a *Terry* stop and lacked probable cause for a warrantless arrest or search.

2. Whether the district court erred in denying the motion to suppress Mr. Gray's statement, where DEA investigators interrogated him following his invocation of his right to counsel and thereafter ignored his repeated requests for counsel, and where this statement was not made voluntarily.

3. Whether the district court erred in holding that the defendants "carried" a weapon during and in relation to a drug trafficking offense within the meaning of 18

U.S.C. §924(c), where the firearms in question were located in the closed and locked trunk of an automobile.

Respectfully submitted,

/s/ Norman Zalkind (ISB)
Norman S. Zalkind (#538880)
Inga S. Bernstein (#627251)
ZALKIND, RODRIGUEZ,
LUNT & DUNCAN
65a Atlantic Avenue
Boston, MA 02110
(617) 742-6020

/s/ John H. Cunha (ISB)
John H. Cunha (#108580)
SALSBERG, CUNHA,
& HOLCOMB
20 Winthrop Square
Boston, MA 02110
(617) 338-1590

I certify that I have this day caused to be served by hand-delivery a copy of this document on all counsel of record,

/s/ Inga S. Bernstein

July 31, 1996

United States Court of Appeals
For the First Circuit

No. 96-1043
No. 96-1669

UNITED STATES OF AMERICA,
Appellee,
v.
DONALD E. CLEVELAND,
Defendant, Appellant.

No. 96-1128

UNITED STATES OF AMERICA,
Appellee,
v.
RAMON E. VASQUEZ,
Defendant, Appellant.

No. 96-1659

UNITED STATES OF AMERICA,
Appellee,
v.
ENRIQUE GRAY-SANTANA,
Defendant, Appellant.

APPEALS FROM THE UNITED STATES
DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS
[Hon. Robert E. Keeton, *U.S. District Judge*]

Before
Boudin, *Circuit Judge*,
Campbell, *Senior Circuit Judge*,
and Bownes, *Senior Circuit Judge*.

Inga S. Bernstein and *John H. Cunha*, by Appointment of the Court, with whom *Norman S. Zalkind, Zalkind, Rodriguez, Lunt & Duncan* and *Salsberg, Cunha & Holcomb, P.C.* were on consolidated briefs, for appellants Enrique Gray-Santana and Donald E. Cleveland.

Oliver C. Mitchell, Jr., with whom *Donnalyn B. Lynch Kahn* and *Goldstein & Manello, P.C.* were on brief for appellant Ramon E. Vasquez.

Andrea Nervi Ward, Assistant United States Attorney, with whom *Donald K. Stern*, United States Attorney, was on briefs for the United States.

February 18, 1997

CAMPBELL, Senior Circuit Judge. Ramon E. Vasquez appeals from his conviction by a jury for conspiracy to possess cocaine with intent to distribute in violation of 21

U.S.C. § 846 and for possession of cocaine with intent to distribute in violation of 21 U.S.C. § 841. He contends that the district court erred in denying his motion to suppress certain physical evidence and in omitting "hesitate to act" language from its reasonable doubt instruction.

Enrique Gray-Santana and Donald Cleveland, who were Vasquez's co-defendants, pleaded guilty to attempting to possess cocaine with intent to distribute in violation of 21 U.S.C. §§ 846 and 841(a) and to carrying or using a firearm during and in relation to a drug trafficking crime in violation of 18 U.S.C. § 924(c)(1). As their guilty pleas permit, they now appeal from the district court's denials of their motions to suppress and motions in limine. They also appeal from the district court's denial of relief from their § 924(c)(1) convictions for carrying or using a firearm in relation to a drug crime. They argue that their guilty pleas and convictions should be invalidated under *Bailey* v. *United States*, ___ U.S. ___, 116 S. Ct. 501 (1995), a decision handed down by the Supreme Court shortly after acceptance of their guilty pleas.

I. Background

Most of the facts are not in dispute. Gray-Santana ("Gray"), a resident of New York City, arranged to secure five . . . (not a present appellant). Gray intended to sell the cocaine through other contacts he had in Boston, so he arranged to take delivery in Boston.

On the morning of October 18, 1994, Gray travelled by bus to Boston, planning to meet Cleveland. Cleveland picked Gray up in a rented white Mazda 929 he had

borrowed from a friend and took him to his house. There, Cleveland and Gray placed three loaded handguns inside a Louis Vuitton duffel bag and put the bag inside the Mazda's trunk. The two planned to use the guns to rob their suppliers of their cocaine. At around 4 p.m., Cleveland and Gray were paged by Rodriguez. They then left in the Mazda to meet Rodriguez in the Symphony Hall area of Boston.

At this time, the Drug Enforcement Administration was investigating one Juan Pagan. The DEA had information that Pagan was shipping large amounts of cocaine from Puerto Rico to New England. On October 17, 1994, heightened phone activity led DEA Agents to begin physical surveillance, including videotaping, of the Connecticut apartment complex where Juan Pagan resided. Around noon on October 18, 1994, two cars arrived at the complex. The first was a Lexus, driven by William Acosta with Vasquez in the back seat. The second was a Lincoln, driven by Rodriguez.

After the cars parked, Rodriguez handed Acosta a black bag and then Acosta took the bag up to Pagan's apartment. Vasquez, carrying a cellular phone, got out of the Lexus and sat with Rodriguez in the Lincoln. After ten or fifteen minutes, Acosta came back and spoke to Vasquez, prompting Vasquez and Rodriguez to leave the complex in a brown Oldsmobile driven by one Jorge Quinones. An hour or so later, Vasquez returned in the Oldsmobile, followed by Rodriguez in a white Isuzu Trooper.

The DEA had received information from two confidential sources that Pagan used a white Isuzu Trooper in

his drug operations. These informants had also told the DEA that some of Pagan's vehicles had hidden compartments used to hold drugs. One of the informants had stated that Pagan's white Isuzu Trooper had such a hidden compartment under the rear seat.

After the Isuzu arrived, Acosta and Rodriguez were observed examining its back seat area. Acosta then left, driving the Lexus with Vasquez in the back seat. Rodriguez followed them in the Isuzu. The two cars drove to Boston on major highways, staying close to 55 miles per hour. DEA agents followed them the entire way.

After the caravan arrived in the Symphony Hall area of Boston, Acosta and Rodriguez parked the cars. Acosta then used the Lexus to guide Cleveland and Gray, who had arrived in the Mazda, to where the Isuzu was parked. Acosta drove away, and Vasquez was next observed sitting in the back seat of the Mazda. Gray exited the Mazda and got into the Isuzu. Vasquez got into the front seat of the Mazda.

The two cars began to drive off. At this point, the DEA agents blocked them. The agents ordered the occupants of both cars to exit their vehicles and handcuffed them. The agents then moved the suspects and their cars out of traffic to a nearby parking lot.

The agents searched the Isuzu and found six kilograms of cocaine in a concealed compartment underneath the back seat. They then searched the Mazda and found the bag in the trunk containing the three guns, rope and duct tape. At that point, the four men were told they were under arrest.

A few hours after his arrest, while he was in custody, Gray gave a statement to DEA agent Bruce Travers confessing to participation in the events described above.

Vasquez filed a motion to suppress the physical evidence found on his person at the time of his arrest. The district court denied his motion. Vasquez was tried by a jury and convicted of conspiracy to possess cocaine with intent to distribute and of possession of cocaine with intent to distribute. The court sentenced him to 121 months in prison.

Cleveland and Gray eventually pled guilty to attempting to possess cocaine with intent to distribute and to carrying or using a firearm during and in relation to a drug trafficking crime, subject to their right to appeal any adverse ruling by the district court on their motions to suppress physical evidence and to suppress Gray's post-arrest statement. The district court denied their motions and sentenced each of them to 180 months in prison and 60 months of supervised release.[1] After the Supreme Court came down with its *Bailey* decision, 116 S. Ct. 501, Cleveland and Gray moved in the district court for relief from the conviction for carrying or using a firearm in relation to a drug trafficking crime. The court denied that motion.

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[1] Rodriguez pleaded guilty to conspiracy and possession charges and was also sentenced to 120 months in prison and 60 months of supervised release.

II. Vasquez

A. The Search of Vasquez's Person:

In his first point of error, Vasquez argues that the district court erred in denying his motion to suppress the physical evidence the agents found on his person. This included a pager, address book, business cards, and notes tying Vasquez to the other defendants. He contends that a wrongful de facto arrest occurred when he was initially ordered out of the Mazda and handcuffed. (Only later was Vasquez told he was under arrest and thereafter searched, by which time the cocaine had been discovered in the Isuzu.) Because the initial de facto arrest was allegedly without probable cause, Vasquez argues that it was illegal and that it tainted all subsequent events, causing the later search of his person to violate the Fourth Amendment.

The district court held, however, and we agree, that the agents had probable cause to arrest Vasquez at the time they ordered him out of the Mazda and handcuffed him. Accordingly, regardless of whether the arrest occurred then or later, the arrest was legal and the subsequent search of his person was proper. "[I]t is well established that '[i]f an arrest is lawful, the arresting officers are entitled to search the individual apprehended pursuant to that arrest.' " *United States* v. *Torres-Maldonado*, 14 F.3d 95, 105 (1st Cir.) (quoting *United States* v. *Uricoechea-Casallas*, 946 F.2d 162, 165 (1st Cir. 1991)), *cert. denied*, 115 S. Ct. 193 (1994).

"Law enforcement officers may effect warrantless arrests provided that they have probable cause to believe that the suspect has committed or is committing a crime."

United States v. *Martinez-Molina*, 64 F.3d 719, 726 (1st Cir. 1995) (citing *United States* v. *Watson*, 423 U.S. 411, 416-18 (1976); *Gerstein* v. *Pugh*, 420 U.S. 103, 113-14 (1975)). "[The government] need only show that, at the time of the arrest, the facts and circumstances known to the arresting officers were sufficient to warrant a prudent person in believing that the defendant had committed or was committing an offense." *Torres-Maldonado*, 14 F.3d at 105. *See also Beck* v. *Ohio*, 379 U.S. 89, 91 (1964).

"Of course, probable cause must exist with respect to each person arrested, and 'a person's mere propinquity to others independently suspected of criminal activity does not, without more, give rise to probable cause to search that person.' " *Martinez-Molina*, 64 F.3d at 726 (quoting *Ybarra* v. *Illinois*, 444 U.S. 85, 91 (1979)). "[C]ases in which courts find that probable cause exists generally involve substantially more than a momentary, random, or apparently innocent association between the defendant and the known criminal activity." *Martinez-Molina*, 64 F.3d at 727 (discussing cases).

Here, prior to seizing Vasquez, the agents had been investigating Pagan and his drug trafficking operations for several years. Before the events of this case, the agents had learned from informants that Pagan was trafficking in kilogram quantities of cocaine, shipping it from Puerto Rico to Hartford, Connecticut and Springfield, Massachusetts. The agents had learned that Pagan used couriers to transport the cocaine. Some of Pagan's couriers had been arrested at the San Juan airport with several kilograms of cocaine in their luggage and had admitted to working for Pagan.

Two confidential informants who had each proved reliable in related matters had told DEA agents that among the many vehicles Pagan used to transport drugs and money was a white Isuzu Trooper. They each also related that Pagan's transport vehicles often had a concealed, electronically-controlled compartment used to hide whatever was being moved. One of them asserted that he had seen that the white Isuzu Trooper had such a compartment in the floor under the rear seat.

The agents had also learned from one of the informants and from other sources that Pagan's girlfriend lived in apartment D-219 at the Connecticut apartment complex and that Pagan used that apartment in his drug activities. The apartment was listed under the name "J. Pagan." The DEA had installed a pen register on the apartment's phone so they could track calls made to and from that number.

On October 17, 1994, the pen register revealed a sharp increase in phone activity from the Connecticut apartment. Some of the numbers being called matched cellular phone and beeper numbers that the agents knew belonged to Pagan's previously identified drug associates. The agents decided to begin physical surveillance of the Connecticut apartment. This surveillance included agents stationed around the apartment complex and two agents who were equipped with a video camera in an apartment that had a view of Pagan's apartment.

A little after noon on October 18th, the agents observed a Lexus and a Lincoln Town Car enter the apartment's parking lot. The various movements of people and vehicles that followed, coupled with the DEA's

information about Pagan's drug dealing, strongly indicated that a drug transaction was taking place. Acosta, who had been driving the Lexus, entered Pagan's apartment building followed by Rodriguez, carrying a large black shoulder bag. Rodriguez handed this bag to Acosta in the building's lobby. Later on, the agents saw Acosta talking to Pagan on Pagan's balcony.

Vasquez exited the Lexus and walked over to Rodriguez and the Lincoln carrying a cellular phone, one of the "well known tools of the drug trade." *United States* v. *De La Cruz*, 996 F.2d 1307, 1311 (1st Cir.), *cert. denied*, 510 U.S. 936 (1993). *See also Martinez-Molina*, 64 F.3d at 728. Vasquez waited with Rodriguez inside the Lincoln until Acosta came out with another man, Jorge Quinones, and spoke to Vasquez. Then Quinones left, returning shortly in a brown Oldsmobile. Vasquez and Rodriguez got into the Oldsmobile and drove out of the complex.

An hour or so later Vasquez and Quinones returned, followed by Rodriguez in a white Isuzu Trooper, exactly the car the agents had been told Pagan used to transport drugs and drug proceeds. It was also the vehicle said to have a hidden compartment for drugs and money in the floor under the rear seat. While Pagan stood on his balcony overlooking the parking lot, Acosta and Rodriguez were seen to be looking into the Isuzu's back seat area, where the secret compartment was said to be located.

At this point, the agents had probable cause to believe that Vasquez, Rodriguez, Acosta, Pagan, and Quinones were involved in a drug transaction, with the Isuzu Trooper likely bearing the contraband. Rather than

arrest the suspects immediately, the agents chose to follow the Isuzu Trooper and the Lexus as they drove to Boston.

What happened thereafter – beginning with the drive in tandem to Boston and ending with the agents' intervention – was wholly consistent with the existence of an unfolding drug transaction and Vasquez's active involvement. Vasquez and Rodriguez stood on a Boston street corner, apparently checking the area for police. Later, and after the agents had seen Acosta speak to Cleveland and Gray, the agents spotted Vasquez inside the Mazda, to which he had moved from the Lexus. Vasquez was still inside the Mazda with Cleveland when the agents stopped the vehicles and ordered everyone out.

By this time, the agents had abundant evidence to constitute probable cause that Vasquez was involved in an ongoing drug trafficking crime and that his association with the other suspects was not momentary, random, or innocent. They had authority, therefore, at the time he was ordered from the Mazda and handcuffed, to arrest Vasquez. The district court did not err in refusing to suppress the various items later found on Vasquez's person when he was searched.

B. The Reasonable Doubt Instruction:

Vasquez asserts that the district court erred in refusing to include "hesitate to act" language in its reasonable doubt instruction. In particular, Vasquez insists that, upon his objection to the omission, the court should have complied with his request to tell the jury, "When we talk about a reasonable doubt, we mean a doubt based upon

reason and common sense, the kind of doubt that would make a reasonable person hesitate to act."

The short answer to this argument is that this court has explicitly held that a district court's refusal to include "hesitate to act" language in its explanation of reasonable doubt to the jury does not constitute reversible error. *See United States* v. *Vavlitis*, 9 F.3d 206, 212 (1st Cir. 1993); *United States* v. *O'Brien*, 972 F.2d 12, 15 (1st Cir. 1992). Although we accepted an instruction that included such language in *United States* v. *Drake*, 673 F.2d 15, 21 (1st Cir. 1982), we have also criticized the "hesitate to act" formulation. *See Gilday* v. *Callahan*, 59 F.3d 257, 264 (1st Cir. 1995) (characterizing the "hesitate to act" language as "arguably unhelpful"), *cert. denied*, 116 S. Ct. 1269 (1996); *O'Brien*, 972 F.2d at 15-16 (criticizing instructions such as the "hesitate to act" formulation which compare reasonable doubt to the decisional standard used by individual jurors in their own affairs as trivializing the constitutionally required burden of proof).

The Supreme Court has stated that the Constitution does not require district courts to define reasonable doubt, nor does it require trial courts who do choose to explain the term to employ "any particular form of words . . . in advising the jury of the government's burden of proof." *Victor* v. *Nebraska*, 511 U.S. 1, 5 (1994). "Rather, 'taken as a whole, the instructions must correctly convey the concept of reasonable doubt to the jury.' " *Id.* (quoting *Holland* v. *United States*, 348 U.S. 121, 140 (1954)).

In instructing the jury on reasonable doubt, the district court stated:

As I have said, the burden is upon the Government to prove beyond a reasonable doubt that a defendant is guilty of the charge made against the defendant. It is a strict and heavy burden, but it does not mean that a defendant's guilt must be proved beyond all possible doubt. It does require that the evidence exclude any reasonable doubt concerning a defendant's guilt.

A reasonable doubt may arise not only from the evidence produced but also from a lack of evidence. Reasonable doubt exists when, after weighing and considering all the evidence, using reason and common sense, jurors cannot say that they have a settled conviction of the truth of the charge.

Of course, a defendant is never to be convicted on suspicion or conjecture. If, for example, you view the evidence in the case as reasonably permitting either of two conclusions – one that a defendant is guilty as charged, the other that the defendant is not guilty – you will find the defendant not guilty.

It is not sufficient for the Government to establish a probability, though a strong one, that a fact charged is more likely to be true than not true. That is not enough to meet the burden of proof beyond reasonable doubt. On the other hand, there are very few things in this world that we know with absolute certainty, and in criminal cases the law does not require proof that overcomes every possible doubt.

Concluding my instructions on the burden, then, I instruct you that what the Government must do to meet its heavy burden is to establish the truth of each part of each offense charged by proof that convinces you and leaves you with no

reasonable doubt, and thus satisfies you that you can, consistently with your oath as jurors, base your verdict upon it. If you so find as to a particular charge against a defendant, you will return a verdict of guilty on that charge. If, on the other hand, you think there is a reasonable doubt about whether the defendant is guilty of a particular offense, you must give the defendant the benefit of the doubt and find the defendant not guilty of that offense.

This explanation correctly conveyed the concept of reasonable doubt to the jury.

III. Cleveland and Gray

A. The Vehicle Searches:

In their first point of error, Cleveland and Gray argue that the district court erred in refusing to grant their motion to suppress the evidence found in the agents' search of the Isuzu Trooper and of the Mazda.

"A police officer may effect a warrantless search of the interior of a motor vehicle on a public thoroughfare as long as he has probable cause to believe that the vehicle contains contraband or other evidence of criminal activity." *United States* v. *Staula*, 80 F.3d 596, 602 (1st Cir.), *cert. denied*, 117 S. Ct. 156 (1996). *See also California* v. *Acevedo*, 500 U.S. 565, 570 (1991); *Chambers* v. *Maroney*, 399 U.S. 42, 46-52 (1970); *United States* v. *Martinez-Molina*, 64 F.3d 719, 730 (1st Cir. 1995). When the police have probable cause to search a vehicle, they may also search closed containers within that vehicle. *See Acevedo*, 500 U.S. at 569-81.

Even assuming that Cleveland and Gray have standing to contest the searches in this case, a problematic proposition in itself, the agents clearly had probable cause to search the vehicles. As explained in Part II-A, above, by the time the agents stopped the two cars, they had probable cause to believe that the defendants were involved in a drug transaction and that the Trooper contained contraband. The movements of the Mazda in following the Lexus to rendezvous with the Isuzu, when combined with the exchange of personnel – Gray moving into the Isuzu and Vasquez entering the Mazda – provided the agents with probable cause to believe that Cleveland and Gray were also involved in the drug transaction and that the Mazda contained contraband. The warrantless search thus did not violate the Fourth Amendment, and the district court did not err in refusing to suppress the evidence found in the two vehicles.

B. Gray's Statement:

In the next point of error, Gray asserts that the district court should have suppressed the statement he made to Agent Travers in the DEA office after his arrest. Gray claims that he had invoked his right to counsel before making the statement and that the agents coerced the statement from him through intimidation.

The district court, after holding two evidentiary hearings at which it heard the testimony of Gray, Agent Travers, and another agent present at DEA headquarters the night of Gray's arrest, concluded that Gray's various allegations of coercive activity by the agents were not credible. The court also found that Gray had initiated the

conversation with the agents that led to his confession by knocking on the door of his cell. Gray then told Agent Travers that he wished to speak with him about the events leading up to his arrest and signed a written waiver of his rights. After examining the record, we believe that these findings of fact by the district court were not clearly erroneous. *See United States* v. *Valle*, 72 F.3d 210, 213-14 (1st Cir. 1995) ("In reviewing orders granting or denying suppression motions, this court scrutinizes a district court's factual findings, including its credibility determinations, for traces of clear error.").

In this case, as in *Valle*, "whether or not to suppress the challenged statements boils down to a credibility call" and "[s]uch calls are grist for the district court's mill." *Valle*, 72 F.3d at 214. Since Gray initiated the contact with the agents that led to his statement after he had invoked his right to counsel, the district court was correct to deny the motion to suppress. *See Edwards* v. *Arizona*, 451 U.S. 477, 484-86 (1981) (holding that once a defendant has asked for an attorney, she is not subject to further interrogation by the police until after counsel has been made available to her unless she herself initiates further communication with the authorities); *United States* v. *Fontana*, 948 F.2d 796, 805-06 (1st Cir. 1991) (noting that initiation of interrogation by the accused has been broadly interpreted); *Watkins* v. *Callahan*, 724 F.2d 1038, 1042 (1st Cir. 1984) (stating that "an accused is not powerless to countermand an election to talk to counsel").

Similarly, we find no clear error in the district court's determination that the agents did not commit the coercive acts alleged by Gray. *See United States* v. *Burns*, 15 F.3d 211, 216 (1st Cir. 1994) ("Although the ultimate issue

of voluntariness is a question of law subject to plenary review, we will accept the district court's subsidiary findings of fact unless they are 'clearly erroneous.' ").

Based on the facts as found by the district court, the court's holding that Gray's statement was voluntary and therefore admissible at trial under 18 U.S.C. § 3501 was proper.

The court applied the totality of the circumstances test mandated by 18 U.S.C. § 3501(b), paying particular attention to the factors identified by that section.[2] Gray gave his statement within six hours of his arrest, bringing

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[2] 18 U.S.C. § 3501(b) states:

> (b) The trial judge in determining the issue of voluntariness shall take into consideration all the circumstances surrounding the giving of the confession, including (1) the time elapsing between arrest and arraignment of the defendant making the confession, if it was made after arrest and before arraignment, (2) whether such defendant knew the nature of the offense with which he was charged or of which he was suspected at the time of making the confession, (3) whether or not such defendant was advised or knew that he was not required to make any statement and that any such statement could be used against him, (4) whether or not such defendant had been advised prior to questioning of his right to the assistance of counsel; and (5) whether or not such defendant was without the assistance of counsel when questioned and when giving such confession.
>
> The presence or absence of any of the above-mentioned factors to be taken into consideration by the judge need not be conclusive on the issue of voluntariness of the confession.

this case within the rule of § 3501(c).[3] The court found that Gray knew the nature of the offense of which he was suspected at the time he made the confession; knew that he was not required to make any statement and that any statement he did make could be used against him; and had been advised prior to the questioning of his right to the assistance of counsel. The court acknowledged that Gray had been without the assistance of counsel when he gave his statement, but held that in this case, this fifth factor was heavily outweighed by the other four factors and by the case's particular circumstances.

We agree with the district court that Gray's statement was voluntary.

C. The "Carry" Issue:

Cleveland and Gray pleaded guilty to violating 18 U.S.C. § 924(c)(1). That statute imposes a five-year prison term on anyone who, "during and in relation to any crime of violence or drug trafficking crime . . . uses or carries a firearm." 18 U.S.C. § 924(c)(1). After the Supreme Court's opinion in *Bailey*, they both sought revocation of their convictions based on guilty pleas to

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[3] 18 U.S.C. § 3501(c) states, in relevant part:

> (c) In any criminal prosecution by the United States . . . a confession made or given by a person who is a defendant therein, while such person was under arrest . . . shall not be inadmissible solely because of delay in bringing such person before a magistrate . . . if such confession was made or given by such person within six hours immediately following his arrest or other detention. . . .

the § 924(c)(1) charges. Gray, against whom judgment had not yet entered, filed an unsuccessful Motion to Correct Sentence under Fed. R. Crim. P. 35(c), and Cleveland, against whom judgment had entered and whose direct appeal was already pending, filed an equally unavailing motion under 28 U.S.C. § 2255. The various appeals were consolidated. The government does not dispute our jurisdiction to consider on the merits Cleveland and Gray's claims that their guilty pleas are invalid in light of *Bailey*. Since we reject those claims, we do not address any potential jurisdictional question stemming from Cleveland's § 2255 appeal.

The broad definition of "use" formerly employed by this circuit and under which Cleveland and Gray pleaded guilty was unanimously disapproved by the Supreme Court in *Bailey*. Stating the need to interpret statutory terms in accordance with their "ordinary or natural" meaning, the Court relied on the dictionary definition of "use" in holding that a conviction under the "use" prong of the statute could only be upheld if the defendant "actively employed the firearm during and in relation to the predicate crime." *Bailey*, 116 S. Ct. at 506-09. Mere possession or storage of the weapon is insufficient. *Id.* at 508-09.

Under *Bailey*, Cleveland and Gray cannot be convicted under § 924(c)'s "use" prong. The guns remained in the Mazda's trunk throughout the events in question; neither Cleveland nor Gray "actively employed" the firearm. Their guilty pleas might still, however, be upheld under the statute's "carry" prong.

While *Bailey* did not address the requirements relative to "carry," the Supreme Court stated that part of its rationale for defining "use" more narrowly was to preserve a separate, nonsuperfluous meaning for "carry." *Bailey*, 116 S. Ct. at 507. The Court wrote, "Under the interpretation we enunciate today, a firearm can be used without being carried, *e.g.*, when an offender has a gun on display during a transaction, or barters with a firearm without handling it; and a firearm can be carried without being used, *e.g.*, when an offender keeps a gun hidden in his clothing throughout a drug transaction." *Id.* at 507. The Court remanded the case for a determination of whether a defendant could be convicted under the "carry" prong either for having a gun inside a bag in a locked car trunk or for having an unloaded firearm in a locked footlocker inside a bedroom closet. *Id.* at 509.

Bailey leaves us with two questions concerning the proper interpretation of "carry." First, must a firearm be on a suspect's person to be "carried" or can one also "carry" a firearm in a vehicle? Second, if one can "carry" a firearm in a vehicle, must the weapon be immediately accessible to the defendant to be "carried"?

The first question is easily answered. We have already held post-*Bailey* that a firearm can be "carried" in a boat, a conveyance that seems indistinguishable for present purposes from a land vehicle like a car. *United States* v. *Ramirez-Ferrer*, 82 F.3d 1149 (1st Cir.), *cert. denied*, 117 S. Ct. 405 (1996).

This result accords both with our pre-*Bailey* "carry" cases and with the holdings of the other circuits to have considered this issue post-*Bailey*. *See, e.g., United States* v.

Plummer, 964 F.2d 1251, 1252-54 (1st Cir.) (acknowledging the defendant-driver's concession that the presence of a gun in his vehicle either in the driver's seat or on the front passenger seat was sufficient to establish that he had "carried" a gun under § 924(c)(1)), *cert. denied*, 506 U.S. 926 (1992); *United States* v. *Eaton*, 890 F.2d 511, 511-12 (1st Cir. 1989) (acknowledging the defendant's concession that he had "carried" a gun for the purposes of § 924(c)(1) when the gun had been under the front seat of the truck he was driving), *cert. denied*, 495 U.S. 906 (1990); *United States* v. *Giraldo*, 80 F.3d 667, 677-78 (2d Cir.) (upholding a § 924(c)(1) conviction for "carrying" a gun in a car), *cert. denied*, 117 S. Ct. 135 (1996); *United States* v. *Mitchell*, No. 95-5792, 1997 WL 12115, at *2-4 (4th Cir. Jan. 15, 1997) (same); *United States* v. *Fike*, 82 F.3d 1315, 1327-28 (5th Cir.) (stating that a gun may be "carried" in a car), *cert. denied*, 117 S. Ct. 241-42 (1996); *United States* v. *Riascos-Suarez*, 73 F.3d 616, 623 (6th Cir.) (same), *cert. denied*, 117 S. Ct. 136 (1996); *United States* v. *Molina*, 102 F.3d 928, 930-32 (7th Cir. 1996) (same); *United States* v. *Willis*, 89 F.3d 1371, 1377-79 (8th Cir.) (same), *cert. denied*, 117 S. Ct. 273 (1996); *United States* v. *Staples*, 85 F.3d 461, 464 (9th Cir.) (same), *cert. denied*, 117 S. Ct. 318 (1996); *United States* v. *Miller*, 84 F.3d 1244, 1256-61 (10th Cir.) (same), *cert. denied*, 117 S. Ct. 443 (1996); *United States* v. *Farris*, 77 F.3d 391, 395 (11th Cir.) (upholding a § 924(c)(1) conviction for "carrying" a gun in a car), *cert. denied*, 117 S. Ct. 241 (1996).

On the second question, we agree with the Fourth, Seventh and Tenth Circuits that a gun may be "carried" in a vehicle for the purposes of § 924(c)(1) without necessarily being immediately accessible to the defendant

while it is being transported. *See Miller*, 84 F.3d at 1260; *Molina*, 102 F.3d at 930-32; *Mitchell*, at *3.

Since *Bailey*, this Circuit has twice faced questions concerning the scope of the statute's "carry" prong. In *United States* v. *Manning*, 79 F.3d 212 (1st Cir.), *cert. denied*, 117 S. Ct. 147 (1996), we held that carrying a briefcase containing a gun, pipe bombs, drugs, and drug paraphernalia was sufficient to fulfill the "carry" requirement. In *Ramirez-Ferrer*, already noted, we held that a loaded revolver covered by a T-shirt within the defendant's reach on a cocaine-laden boat upon which the defendant was travelling was being "carried" for the purposes of § 924(c)(1). In neither case, however, did we have to decide whether a firearm in a vehicle in which a defendant is travelling needs to be within easy reach to be "carried" for the purposes of § 924(c)(1).

Since some circuits have, since *Bailey*, continued to rely upon their pre-*Bailey* "carry" case law, we look at ours as well, but find no case that is entirely on point. *See, e.g.*, *United States* v. *Castro-Lara*, 970 F.2d 976, 982-83 (1st Cir. 1992) (upholding a conviction under § 924(c)(1) when the gun was in a briefcase in a locked car trunk without specifying whether the conviction was under the statute's "use" or "carry" prong), *cert. denied*, 508 U.S. 962 (1993); *Plummer*, 964 F.2d at 1252-54 (acknowledging the defendant-driver's concession that the presence of a gun in his vehicle either in the driver's seat or on the front passenger seat was sufficient to establish that he had "carried" a gun under § 924(c)(1)); *Eaton*, 890 F.2d at 511-12 (acknowledging the defendant's concession that he had "carried" a gun for the purposes of § 924(c)(1) when the

gun had been under the front seat of the truck he was driving).

"When a word is not defined by statute, we normally construe it in accord with its ordinary or natural meaning." *Smith* v. *United States*, 508 U.S. 223, 228 (1993). In *Bailey*, the Supreme Court turned to the dictionary for help in determining the meaning of "use," *Bailey*, 116 S. Ct. at 506, so we do the same with "carry."

Webster's Third New International Dictionary of the English Language Unabridged 343 (3d ed. 1971) defines "carry" as, "1: to move while supporting (as in a vehicle or in one's hands or arms): move an appreciable distance without dragging: sustain as a burden or load and bring along to another place."*Webster's* goes on to list many other definitions of the word and then, in differentiating "carry" from some of its synonyms, states:

> CARRY indicates moving to a location some distance away while supporting or maintaining off the ground. Orig. indicating movement by car or cart, it is a natural word to use in ref. to cargoes and loads on trucks, wagons, planes, ships, or even beasts of burden.

Id. This definition, therefore, clearly includes the transport of a firearm by car; the concept of whether or not the carried item is within reach plays no part in the definition.

Black's Law Dictionary 214 (6th ed. 1990) defines "carry" as, "To bear, bear about, sustain, *transport*, remove, or *convey*. To have or bear upon or about one's person, as a watch or weapon; locomotion not being essential. . . . " (emphasis supplied). However, *Black's*

defines the specific phrase "carry arms or weapons" more narrowly as, "To wear, bear, or carry them upon the person or in the clothing or in a pocket, for the purpose of use, or for the purpose of being armed and ready for offensive or defensive action in case of a conflict with another person." *Id.*

The latter *Black's* definition of "carry arms or weapons" limits "carrying" to the defendant's person and so at least implies accessibility. However, even the circuits which have read an immediate accessibility requirement into "carry" under § 924(c)(1) have never limited the statutory language to "carrying" a firearm on the person. Indeed, such circuits, like the others to confront the issue, have all upheld convictions for "carrying" a weapon in a car. *See United States* v. *Cruz-Rojas*, 103 F.3d 283, 286 (2d Cir. 1996) (remanding two "carry" convictions to determine if a gun under a car's dashboard was accessible to either defendant); *Riascos-Suarez*, 73 F.3d at 623 (upholding a "carry" conviction when the gun was in a car near the driver's seat); *United States* v. *Willett*, 90 F.3d 404, 406-07 (9th Cir. 1996) (holding that a gun transported in a car was "carried" because it was easily accessible).

We strongly doubt – given the omnipresence of automobiles in today's world and in drug dealing, and given the basic meaning of "carry" as including transport by vehicle – that Congress, in prescribing liability for anyone who "uses or carries" a firearm during or in relation to a drug trafficking offense, meant to exclude a defendant who transports the gun in his car, rather than on his person, for use in a drug transaction. Hence the *Black's*

Law Dictionary restricted definition of the phrase "carry arms or weapons" seems inapposite here.

It is true, of course, that to come under § 924(c)(1), "the firearm must have some purpose or effect with respect to the drug trafficking crime; its presence or involvement cannot be the result of accident or coincidence." *Smith*, 508 U.S. at 238. In certain circumstances, a firearm's immediate accessibility to a defendant might be relevant to determining whether or not he was carrying it "during and in relation to" a drug trafficking crime, as the statute requires. 18 U.S.C. § 924(c)(1). But a firearm need not always be instantly accessible in order to be carried "during and in relation to" a drug trafficking crime. Here, the evidence shows that the defendants had placed the three firearms in question in the Mazda's trunk and, when arrested, were carrying them for the purpose of using them to rob their suppliers during the ongoing drug trafficking crime. Evidence of this purpose plainly demonstrated the necessary nexus to the drug trafficking offense wholly apart from whether the guns were within the immediate reach of those seated in the car at the time they were stopped by the agents.

As noted above, the Fourth, Seventh, and Tenth Circuits have held that a gun does not need to be readily accessible to be "carried" in a vehicle. *See Mitchell*, at *2-4; *Molina*, 102 F.3d at 930-32; *Miller*, 84 F.3d at 1256-61.

Other circuits, while not explicitly deciding the issue one way or the other, appear to be leaning toward adopting the same approach. *See United States* v. *Pineda-Ortuno*, 952 F.2d 98, 103-04 (5th Cir.) (a pre-*Bailey* case holding that the circuit's cases requiring a showing that the gun

was within the defendant's reach during the commission of the drug offense did not apply when the gun was "carried" in a vehicle), *cert. denied*, 504 U.S. 928 (1992); *United States* v. *Fike*, 82 F.3d 1315, 1327-28 (5th Cir. 1996) (a post-*Bailey* case upholding a defendant's conviction under § 924(c)(1) for "carrying" a gun that was within his reach in a car but not stating that accessibility was a requirement); *United States* v. *Rivas*, 85 F.3d 193, 194-96 (5th Cir.) (same), *cert. denied*, 117 S. Ct. 593 (1996); *United States* v. *Willis*, 89 F.3d 1371, 1377-79 (8th Cir. 1996) (relying on pre-*Bailey* case law to hold that transporting a firearm in the passenger compartment of a vehicle satisfies the "carry" prong of § 924(c)(1) but not addressing the weapon's accessibility); *United States* v. *Caldwell*, 97 F.3d 1063, 1068-70 (8th Cir. 1996) (upholding a conviction under § 924(c)(1)'s "carry" prong for a case in which the defendant's gun was in a car's hatchback, an area the court regarded as within the car's occupants' reach); *United States* v. *Farris*, 77 F.3d 391, 395 (11th Cir. 1996) (relying on pre-*Bailey* case law to uphold a § 924(c)(1) conviction for a defendant who was sitting in the back seat of a car while the firearm in question was in the glove compartment but not discussing whether the defendant could easily have reached the gun).

We recognize that the Second, Sixth, and Ninth Circuits have taken a contrary position, requiring that the firearms be immediately accessible. *See Giraldo*, 80 F.3d at 676-78; *Riascos-Suarez*, 73 F.3d at 623-24; *Staples*, 85 F.3d at 464. We find the reasoning of these courts unpersuasive.

In *Giraldo*, the Second Circuit relied entirely on its pre-*Bailey* case *United States* v. *Feliz-Cordero*, 859 F.2d 250 (2d Cir. 1988), in holding that a gun transported in a

vehicle must be immediately accessible to be "carried." But *Feliz-Cordero* merely stated that "carry" should be given its literal meaning. The court thought that the literal meaning of "carry," when the "carrying" was done by a vehicle, required the gun to be within reach during the commission of the drug offense. *Feliz-Cordero*, 859 F.2d at 253. The court did not refer to any authority for this proposition and cited to only one case, *United States* v. *Brockington*, 849 F.2d 872 (4th Cir. 1988). *Brockington* does not so much as mention an immediate accessibility requirement, nor does it discuss the meaning of "carry." The only relevance *Brockington* has to this issue is that that panel upheld the "carry" conviction of a taxi cab passenger who had a loaded pistol under the floormat beneath his seat.

The Sixth Circuit in *Riascos-Suarez* inferred the immediate availability requirement from the Supreme Court's admonitions in *Bailey* that "use" must mean more than "possession," *Bailey*, 116 S. Ct. at 508, and that a defendant could not be charged under § 924(c)(1) for mere storage of a weapon, *id.* The easy reach requirement, the *Riascos-Suarez* panel reasoned, is necessary to distinguish "carry" from possession and storage. *Riascos-Suarez*, 73 F.3d at 623.

We disagree. We question the degree to which an easy reach requirement would differentiate "carry" from "possess." More importantly, we agree with the Tenth Circuit that the distinguishing characteristic of "carry" is not the instant availability of the item carried, but the fact that the item is being moved from one place to another by the carrier, either personally or with the aid of some appropriate vehicle. *See Miller*, 84 F.3d at 1260.

The Ninth Circuit's decision in *Staples* relied primarily on its earlier opinion in *United States* v. *Hernandez*, 80 F.3d 1253, 1256-58 (9th Cir. 1996) (holding that a gun in a locked toolbox was not "carried" under § 924(c)(1)), in stating that a firearm had to be immediately available for use to be "carried" in a vehicle. The *Hernandez* panel looked to find the ordinary or natural meaning of "carry." But its quotation from *Webster's* definition of "carry," *supra*, was selective, omitting the definition's references to vehicles. The court also quoted from *Black's* definition of the single phrase, "carry arms or weapons," *supra*, and cited the Sixth Circuit's *Riascos-Suarez* opinion. As we have discussed, however, the ordinary meaning of the term "carry" includes transport by vehicle and affords no basis for imposing an accessibility requirement.

Turning to the case before us, both Cleveland and Gray pled guilty to using or carrying a weapon during and in relation to a drug trafficking offense. They do not now contend, nor could they, that the three loaded handguns found in the trunk of their car alongside rope and duct tape were unrelated to the drug trafficking offense they were committing at the time they were apprehended. In fact, Cleveland admitted at the suppression hearing that he and Gray intended to use the guns to rob the drugs from their suppliers. Their challenge to their convictions on the § 924(c)(1) charge consists solely of the claim that, after *Bailey*, they can not be convicted under the statute's "use" prong and that a conviction under the "carry" prong would require the guns to have been easily accessible. As under the standard definition of "carry" the guns were being "carried," and as we can see no basis for holding that the guns' lack of instant accessibility

precluded them from being "carried," we affirm Cleveland's and Gray's convictions for violations of 18 U.S.C. § 924(c)(1).

Affirmed.

UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

No. 96-1043
No. 96-1669

UNITED STATES OF AMERICA,

Appellee,

v.

DONALD E. CLEVELAND,

Defendant, Appellant.

No. 96-1128

UNITED STATES OF AMERICA,

Appellee,

v.

RAMON E. VASQUEZ,

Defendant, Appellant.

No. 96-1659

UNITED STATES OF AMERICA,

Appellee,

v.

ENRIQUE GRAY-SANTANA,

Defendant, Appellant.

ERRATA

The published opinion of this Court issued on February 18, 1997, is amended as follows:

Page 4: insert as line 1, the following: "to eight kilograms of cocain from co-defendant Juan Rodriguez"

Page 5: 4th line from bottom: delete comma after "Acosta"

(ORDER LIST: 522 U.S.)

FRIDAY, DECEMBER 12, 1997

CERTIORARI GRANTED

96-1654) MUSCARELLO,
FRANK V. UNITED STATES
)
96-8837) CLEVELAND,
DONALD E., ET AL. V. UNITED STATES

The petition for a writ of certiorari is granted in No. 96-1654. The motion of petitioners for leave to proceed in *form* [sic] *pauperis* and the petition for a writ of certiorari in No. 96-8837 are granted. The cases are consolidated and a total of one hour is allotted for oral argument. The briefs of petitioners are to be filed with the Clerk and served upon opposing counsel on or before 3 p.m., Friday, January 23, 1998. The brief of the Solicitor General is to be filed with the Clerk and served upon opposing counsel on or before 3 p.m., Friday, February 20, 1998. Reply briefs, if any, are to be filed with the Clerk and served upon opposing counsel on or before 3 p.m., Wednesday, March 18, 1998. Rule 29.2 does not apply.

No. 96-8837

In The

Supreme Court of the United States

October Term, 1997

DONALD E. CLEVELAND
ENRIQUE GRAY-SANTANA,

Petitioners,

v.

UNITED STATES OF AMERICA,

Respondent.

On Writ Of Certiorari
To The United States Court Of Appeals
For The First Circuit

BRIEF FOR PETITIONERS

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QUESTION PRESENTED

Whether an occupant of a vehicle "carries . . . a firearm" in violation of 18 U.S.C. § 924(c), merely because the vehicle's locked trunk contains a firearm that is completely inaccessible to anyone in the passenger compartment.

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BRIEF FOR THE PETITIONERS

OPINIONS BELOW

The opinion of the United States Court of Appeals for the First Circuit, J.A. 86-116, is reported at 106 F.3d 1056. The unreported opinions of the United States District Court for the District of Massachusetts affirming Gray-Santana's and Cleveland's convictions under 18 U.S.C. § 924(c) are reproduced at J.A. 45-57 and J.A. 58-71, respectively.

JURISDICTION

The United States Court of Appeals for the First Circuit entered its judgment on February 18, 1997. J.A. 87. The petition for a writ of certiorari was filed on April 30, 1997. On December 12, 1997, the Court granted this petition along with the petitioners' motion to proceed *in forma pauperis*, and consolidated this case with *Muscarello v. United States*, No. 96-1654. J.A. 117. The Court has jurisdiction under 28 U.S.C. § 1254(1).

STATUTORY PROVISION INVOLVED

Section 924(c)(1) of Title 18 provides in pertinent part: "Whoever, during and in relation to any crime of violence or drug trafficking crime . . . uses or carries a firearm, shall, in addition to the punishment provided for such crime . . . be sentenced to imprisonment for five years[.]" The language of § 924 and other provisions of Title 18, chapter 44 discussed herein are reproduced in an addendum to this brief.

STATEMENT OF THE CASE

In *Bailey v. United States*, 116 S. Ct. 501 (1995), the Court held that "use . . . of a firearm," for the purposes of 18 U.S.C. § 924(c), requires a showing of active employment of a weapon during and in relation to a predicate offense. The Court rejected a broader definition of use, requiring only "proximity and accessibility," that would have brought within its sweep possession, *Bailey*, 116 S. Ct. at 506, and placement of a weapon for future intended use, *id.* at 507. The instant case calls upon the Court to resolve the companion question, expressly reserved in *Bailey*, whether a person who has a firearm in the trunk of his car during and in relation to a predicate offense "carries a firearm" in violation of § 924(c). Petitioners contend that these circumstances do not give rise to liability under this subsection.

On October 18, 1994, Drug Enforcement Administration (DEA) agents, investigating suspected drug trafficking activity, conducted surveillance on an apartment in a complex in Rocky Hill, Connecticut. J.A. 9, 21. During the course of the surveillance, two cars, a Lexus and an Isuzu Trooper, left the complex, and drove north towards Boston. J.A. 10, 23.

Upon arriving in Boston, the two vehicles drove to St. Stephen's Street near Symphony Hall. J.A. 10, 23. At some point thereafter, agents noted the arrival of petitioners in a Mazda nearby. J.A. 10, 23. Donald Cleveland, who was driving the Mazda, and Enrique Gray-Santana, a passenger in the Mazda, met with an occupant of the Lexus. J.A. 11, 23. Not long thereafter, the Lexus and the Mazda drove around the block and parked near the Trooper. An occupant of the Lexus had gotten into the back seat of the Mazda. J.A. 11, 24. Gray-Santana got out of the Mazda,

walked up St. Stephen's Street to the empty Trooper and tried, unsuccessfully, to open the door. J.A. 11, 24. Gray-Santana walked back to the Mazda, spoke with its occupants and then returned to the Trooper. J.A. 11, 24. By this time, the driver was back with the Trooper and he and Gray-Santana got in. J.A. 11, 24.

Agents stopped the Trooper and the Mazda as they were beginning to drive down St. Stephen's Street. J.A. 11, 24. At the time of the stop, Gray-Santana was a passenger in the Trooper and Cleveland was driving the Mazda. J.A. 11, 24.

Agents searched the Trooper. J.A. 11, 24. During the search, agents found a "hidden compartment" containing six kilograms of cocaine. J.A. 11, 24. Agents then searched the Mazda. J.A. 12, 25. In the trunk of the Mazda, agents found a Louis Vuitton bag. J.A. 12, 25. Three firearms were found inside the bag. J.A. 12, 25. After the search of the Mazda, Cleveland, Gray-Santana and two other men were arrested and transported back to the DEA headquarters, where both Cleveland and Gray-Santana gave statements. J.A. 12, 25.

Cleveland and Gray-Santana admitted that they had arranged a drug deal and discussed stealing, as opposed to buying, the drugs. J.A. 13, 26. On the day they were arrested, Cleveland and Gray-Santana had placed the bag containing the firearms in the trunk of the Mazda. J.A. 13. The two had packed the guns in the bag under a jacket and some sweaters. (Hearing on Motions to Suppress, May 1, 1995, at 16.) The bag, which had a zipper and a lock on it, had been closed and zipped. *Id.* at 17. The bag was placed in the trunk of the Mazda that could only be opened with the car's one key; a key that was also used

for the car's ignition. *Id.* at 18. Later that afternoon, Gray-Santana received a message on his pager from the driver of the Trooper. Gray-Santana spoke to him and they arranged to meet near Symphony Hall. J.A. 13, 26. Cleveland and Gray-Santana then went to the Symphony Hall area and, as outlined above, were arrested. J.A. 13, 26.

On March 15, 1995, a federal grand jury returned an indictment against Cleveland and Gray-Santana, J.A. 2-6, and, in July 1995, both defendants entered conditional guilty pleas to (1) attempting to possess cocaine with intent to distribute, and (2) using and carrying a firearm during and in relation to a drug trafficking crime, reserving the right to appeal adverse rulings by the trial court on their motions to suppress and motions *in limine*.[1]

Following the Court's decision in *Bailey*, Cleveland and Gray-Santana both challenged the imposition of penalties pursuant to 18 U.S.C. § 924(c).[2] The government urged that petitioners carried the firearms by simply having them present in the trunk of the Mazda and argued that the inaccessibility of those firearms had no bearing on the matter. (Gov't Opp. to Gray-Santana's Motion for Correction of Sentence, at 8-10.) Although all parties agreed that a conviction could not be based on "use," as defined in *Bailey*, the trial court judge sustained

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[1] Although Cleveland and Gray-Santana appealed the trial judge's adverse rulings on these motions to the First Circuit, these claims are not before the Court.

[2] Gray-Santana, who attended his sentencing hearing, but against whom judgment had not yet entered at the time of the *Bailey* decision, sought relief *via* a Motion to Correct Sentence and/or for Other Appropriate Relief pursuant to Fed. R. Crim. P. 35. Cleveland sought relief after his sentence was imposed pursuant to 28 U.S.C. § 2255, and as part of his direct appeal.

the convictions based on the "carry" prong of the statute. J.A. 56, 71. Petitioners each received a ten year minimum mandatory sentence for the drug offense and a consecutive, five year minimum mandatory sentence for violation of § 924(c). J.A. 31, 74.

The First Circuit affirmed the District Court. In so doing, it aligned itself with "the Fourth, Seventh and Tenth Circuits [that] have held that a gun does not need to be readily accessible to be 'carried' in a vehicle." J.A. 110. The First Circuit acknowledged, however, "that the Second, Sixth and Ninth Circuits have taken a contrary position, requiring that the firearms be immediately accessible." J.A. 111. In reaching its holding, the First Circuit formulated and addressed the following two questions it considered unresolved by the Court's holding in *Bailey*: "First, must a firearm be on a suspect's person to be 'carried' or can one also 'carry' a firearm in a vehicle? Second, if one can 'carry' a firearm in a vehicle, must the weapon be immediately accessible to the defendant to be 'carried'?" J.A. 105.

In answer to the first of its questions, the First Circuit held that a weapon need not be carried on a suspect's person but can simply be transported in a vehicle, relying on its earlier holding in *United States v. Ramirez-Ferrer*, 82 F.3d 1149 (1st Cir.), *cert. denied*, 117 S. Ct. 405 (1996) that a weapon found in a "conveyance" (in that case a boat) was "carried" and that this holding resolved the issue for all vehicles. J.A. 105.

As to its second question, the First Circuit held that "a gun may be 'carried' in a vehicle for the purposes of § 924(c)(1) without necessarily being immediately accessible to the defendant while it is being transported." J.A. 106-107. In so doing, the First Circuit acknowledged and

then rejected *Black's Law Dictionary*'s specific definition of "carry[ing] arms or weapons," that provides, "To wear, bear, or carry them upon the person or in the clothing or in a pocket, for the purpose of use, or for the purpose of being armed and ready for offensive or defensive action in the case of a conflict with another person." J.A. 108-109 (citing *Black's Law Dictionary* 214 (6th ed. 1990)). The First Circuit recognized that this definition of "'carry arms or weapons' limits 'carrying' to the defendant's person and so at least implies accessibility." J.A. 109.

Nonetheless, the First Circuit opted for a definition of "carry" that "includes transport by vehicle" without any requirement of accessibility. J.A. 113. Judge Campbell explained:

> We strongly doubt – given the omnipresence of automobiles in today's world and in drug dealing, and given the basic meaning of "carry" as including transport by vehicle – that Congress, in prescribing liability for anyone who "uses or carries" a firearm, meant to exclude a defendant who transports the gun in his car, rather than on his person, for use in a drug transaction. Hence the *Black's Law Dictionary* restricted definition of the phrase "carry arms or weapons" seems inapposite here.

J.A. 109-110. Instead of looking to specific definitions of "carry arms or weapons," the First Circuit reviewed definitions of the term "carry" in isolation. J.A. 108. In arriving at its conclusion, the First Circuit ignored the existence of 18 U.S.C. § 924(b), a provision immediately preceding § 924(c) in the statutory scheme, that directly prohibits the transportation of firearms by using the word "transport," not the word "carry."

SUMMARY OF ARGUMENT

Section 924(c) imposes mandatory, consecutive sentences (of at least five years and up to life imprisonment) on any person who "carries a firearm" "during and in relation to" a crime of violence or drug trafficking offense. In this case, and in *United States v. Muscarello*, No. 96-1654, the Court is called on to decide what category of conduct Congress singled out for this especially severe sanction and, conversely, what conduct with respect to firearms Congress intended to treat via other statutory sections or sentencing enhancements.

I. "Carries a firearm" under § 924(c) means bearing a firearm on the person. While in other contexts the term "carry" can mean, simply, "transport" – the definition the First Circuit gave to "carry" – when used in the context of "carrying firearms," "carry" must be understood to mean "bear on the person," a definition not requiring movement. Understanding "carrying" to be limited to "bearing on the person" is consistent with the ordinary meaning of the word "carry" when it is used in the context of firearms and is rooted in the text, structure, and legislative history of § 924(c). The Court should reject the First Circuit's "transport" test because it ignores – and renders meaningless – explicit use elsewhere in the statute of the terms "transport" and "ship" to regulate the transport of firearms and the terms "possess" and "store" to regulate mere possession. Further, reading "carries a firearm" to mean "bears on the person" is consistent with the holding and analysis set forth in *Bailey*. Finally, the petitioners' reading is dictated by the rule of lenity, because no other plausible interpretation is "unambiguously correct."

II. Petitioners prevail under an application of the "bears on the person" test. Even if the Court were to decide that "carries a firearm" has a broader meaning for the purposes of § 924(c), holding either that it includes firearms "within easy reach," or that it includes firearms in a car that are both "transported and immediately accessible," petitioners' convictions should still be vacated. The Court should take this occasion to articulate a clear limit on the scope of "carries" for the purposes of § 924(c) by distinguishing this term from "transports" and "possesses" and by defining this term in accordance with its ordinary and natural meaning.

ARGUMENT

I. ELEMENTARY PRINCIPLES OF STATUTORY INTERPRETATION COMPEL THE CONCLUSION THAT § 924(c) REQUIRES PROOF OF CARRYING A FIREARM ON THE PERSON AND THUS IS NOT SATISFIED BY EVIDENCE OF SIMPLE TRANSPORTATION OF A FIREARM.

In the case at bar, the statute provides in pertinent part: "Whoever, during and in relation to any crime of violence or drug trafficking crime . . . *uses or carries a firearm*, shall . . . be sentenced to imprisonment for five years. . . . " 18 U.S.C. § 924(c) (emphasis added). Statutory interpretation – guided by the principle that the aim is to effectuate the intent of Congress and not to second-guess it – must start with the language of the statute. *Bailey v. United States*, 116 S. Ct. 501, 506 (1995). "The task of resolving the dispute over the meaning of [a statute] begins where all such inquiries must begin: with the language of the statute itself." *United States v. Ron Pair Enterprises, Inc.*, 489 U.S. 235, 241 (1989). The problem that

has split the circuits as they have attempted to apply the Court's analysis in *Bailey* to the "carry" prong of § 924(c) is that the word "carry", in isolation, has two possible meanings, to bear and to transport. However, the tools of statutory interpretation – examining the word both in the phrase "carries a firearm," and in the broader context of the entire statute, as well as reviewing the legislative history – manifest Congress' intent: one "carries a firearm" within the meaning of § 924(c) only if it is borne on the person.

A. The Plain Meaning Of The Phrase "Carries A Firearm" Is To Bear On The Person.

Since the word "carries" is not defined in the statute, it must be given its "ordinary and natural meaning," *Bailey*, 116 S. Ct. at 506, "in light of the terms that surround it[,]" *Smith v. United States*, 508 U.S. 223, 229 (1993). "[T]he meaning of statutory language, plain or not, depends on context." *Brown v. Gardner*, 513 U.S. 115, 118 (1994) (citing *King v. St. Vincent's Hospital*, 502 U.S. 215, 221 (1991)). Although "carry," unmodified, is susceptible to multiple interpretations, in the more specific context provided by the language of § 924(c) "carries a firearm" subjects an individual to criminal liability only in circumstances where a weapon is on his or her person.[3]

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[3] Phrases that come to mind that elucidate our use of language in this connection include "Speak softly and carry a big stick,"-"Give me your money; I'm carrying a gun." As Judge Kozinski recently noted: "If I were to say 'Don Corleone is carrying a gun' – or even just 'Don Corleone is carrying' – you would understand that the Don has a sidearm somewhere on his person. A synonym for carry in this sense is to 'pack heat.' " *United States v. Foster*, 1998 WL 2521, *1 (9th Cir. Jan. 5, 1998) (en

Review of dictionaries reveals that "carry," in the context of the phrase "carry a weapon," means exclusively "to bear on one's person." *Black's Law Dictionary* defines "carry arms or weapons" as:

> To wear, bear, or carry them upon the person or in the clothing or in a pocket, for the purpose of use, or for the purpose of being armed and ready for offensive or defensive action in the case of conflict with another person.

Black's Law Dictionary, at 214 (6th ed. 1990). Other dictionaries confirm that "carrying a firearm" means bearing a firearm on one's person. *Webster's II New College Dictionary* notes one of the meanings of "carry" as follows: "[t]o have or keep on one's person <*carry* a gun>[.]" *Id.* at 170 (1995). Still other dictionaries define "carry," at least in part, based on the object with which it is connected. For example, *Webster's Third New International Dictionary of the English Language Unabridged* provides that carry means "to hold, wear or have upon one's person <he *carries* a watch>[,]" *id.* at 343 (1971, 1976, 1986), and *American Heritage Dictionary of the English Language* notes that carry means "To keep or have on one's person: *stopped carrying credit cards*[,]" *id.* at 294 (3d ed. 1992). The presence of the specific and precise definition of "carrying arms or weapons" (as well as carrying other relatively small, personal items) establishes that, *in context*, the term

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banc). In each case, one infers that the weapon is at hand and constitutes an immediate threat, or, as Judge Kozinski explained, "Criminals who pack heat are obviously much more dangerous than those who do not." *Id.* So, Don Corleone might ask his chauffeur as they drive to a warehouse, "Are you carrying?" and receive the response, "No, it's in the trunk. I'll get it later."

"carry" has a much more specific definition than the First Circuit chose to employ.[4]

The plain meaning of "carries a firearm" – bears on the person – is the meaning the Court has used in discussing § 924(c) in earlier cases. In *Smith v. United States*, the Court stated that a defendant would "'carry' a firearm by *keeping it on his person* whether he intends to exchange it for cocaine or fire it in self-defense." 508 U.S. 223, 236 (1993) (emphasis added).[5] The Court in *Bailey* suggested some parameters of the term "carry" in identifying ways in which "using" and "carrying" differ, as they must to ensure that each statutory term has a "particular, nonsuperfluous meaning." *Bailey*, 116 S. Ct. at 507. The Court noted:

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[4] The Ninth Circuit, in opting for a specific definition of "carries a firearm" in § 924(c), grounds its analyses in evaluations of the "plain language." *See, e.g, Foster*, 1998 WL 2521, at *2 (reviewing the *Black's Law Dictionary* definition of "carry arms or weapons"); *United States v. Hernandez*, 80 F.3d 1253, 1258 (9th Cir. 1996) (observing that the *Webster's* and *Black's* definitions "suggest that the term 'carry' involves activity beyond mere possession").

[5] The dissent in *Smith* is consistent with the majority in its characterization of "carry[ing] a firearm" as meaning "carrying it in such a manner as to be ready for use as a weapon," 508 U.S. at 246 (Scalia, J. dissenting). The dissent focused on its disagreement that *bartering* a firearm is "use." The dissent emphasized the necessity for the weapon to be immediately at hand to be carried: "[t]he ready ability to use a gun that is at hand as a weapon is perhaps one of the reasons the statute sanctions not only *using* a firearm, but *carrying* one." 508 U.S. at 247 n.4. A firearm carried, in the ordinary and natural sense of borne on the person, is readily at hand. A firearm transported in the trunk of a car, or the hold of an airplane, is not.

> [A] firearm can be used without being carried, *e.g.*, when an offender has a gun on display during a transaction, or barters with a firearm without handling it; and a firearm can be carried without being used, *e.g.*, when an offender *keeps a gun hidden in his clothing* throughout a drug transaction.

Id. (emphasis added). From this discussion, one learns that carrying can be found where a firearm is handled, or when a weapon is located on a person's body or in his or her clothing. This discussion also elucidates some of what carrying *is not*: carrying *is not* having a gun on display, or bartering with a firearm without handling it.[6] Defining "carries a firearm" to mean "bears on the person" fits precisely within these parameters.

This definition of "carries a firearm" is in harmony with the Court's construction of the term "use" in *Bailey*. *Bailey* emphasized that "the inert presence of a firearm, without more, is not enough to trigger § 924(c)." *Id.* at

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[6] In *Busic v. United States*, 446 U.S. 398 (1980), the Court addressed the application of § 924(c) to a drug transaction that bears remarkable similarity to the case at bar. In that case, the two defendants arranged a drug deal, ignorant that the seller was an undercover DEA agent. They planned to steal rather than purchase the drugs. During the deal, one defendant fired several shots at the agent. His codefendant, Busic, had a gun in his belt when he was arrested but had not drawn it. Weapons were also found in the defendants' car. Busic's § 924(c) conviction was based on the "carrying" prong of § 924(c) and on his having "carried" the weapon in his belt. There was no suggestion that the weapons in the automobile would trigger "carrying" liability for either defendant. 446 U.S. at 410-411. While not dispositive of the issue of the possible scope of carrying, it is instructive that neither the parties nor the Court apparently considered that carrying would encompass all possession in a vehicle.

508. The Court also squarely rejected the notion that § 924(c) would reach a firearm that was stored or "conceal[ed] . . . nearby to be at the ready for an imminent confrontation." *Id.* Although the *Bailey* holding explicitly construed only the "use" prong of the statute, it is worthy of note that each of these circumstances would be covered by "carry" if the "transportation" test were adopted. As the Ninth Circuit stated in *Foster:*

> [T]here is nothing special about "use" that makes it susceptible to a narrow definition, while parallel terms of the same statute are defined broadly; it just so happens that "use" came before the Court [in *Bailey*], not "carry." Construing the two terms *in pari materia*, we see no basis for defining "carry" broadly while "use" is defined narrowly.

1998 WL 2521, at *3.[7] Thus, the definition of "carry" proposed by the petitioners bears a logical and complementary relationship to "use" as defined in *Bailey* and renders coherent the structure of § 924(c).

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[7] Several other courts of appeal, among them those who elsewhere opt for "transport" as the meaning of "carry," have stated that carrying a firearm "on the person" is the most obvious meaning of that term. *See, e.g., Broadway v. United States*, 104 F.3d 901, 905 (7th Cir. 1997) ("if keeping a gun in your pants pocket does not constitute 'carrying' a gun, we cannot imagine what would") (some internal quotation marks omitted); *United States v. Mitchell*, 104 F.3d 649, 653 (4th Cir. 1997) ("defendant actually possessing a firearm and conveying it on his person . . . during a drug transaction is perhaps the clearest example of a violation of the 'carry' prong of § 924(c)(1)"); *United States v. Johnson*, 108 F.3d 919, 921 (8th Cir. 1997) (holding that evidence of a gun found in the defendant's pants pocket was "clearly sufficient" to support a conviction for carrying a firearm during a drug trafficking offense).

The First Circuit and other circuits that have held that "carries a firearm" means "transports" have looked – erroneously – at the word "carry" in isolation.[8] Although generally speaking, "carry" can assume two different meanings – (1) to bear on one's person, and (2) to transport – both of these meanings are not applied to every context in which the term "carry" is used. *Black's Law Dictionary* defines "carry" in terms of both meanings:

> To bear, bear about, sustain, transport, remove, or convey. *To have or bear upon or about one's person, as a watch or weapon; locomotion not being essential.* As applied to insurance, means "possess" or "hold."

Black's, at 214 (emphasis added);[9] *see also Webster's Third New International Dictionary*, at 343 ("to move while supporting (as in a vehicle or in one's hands or arms): move an appreciable distance without dragging: sustain as a burden or load and bring along to another place . . . to hold, wear or have upon one's person <he *carries* a watch>");[10] *The Oxford English Dictionary*, at 919-20 (2d ed. 1989) *(O.E.D.)*[11] These definitions indicate that,

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[8] The Court has criticized "the regrettable penchant for construing words in isolation." *Deal v. United States*, 508 U.S. 129, 133 (1993).

[9] As noted *supra*, *Black's* defines "carry arms or weapons" separately from this general definition. It is worthy of note that if the plain language analysis began and ended with *Black's Law Dictionary*, the leading legal dictionary, petitioners' definition of "carrying a firearm" would "carry" the day.

[10] Certainly, according to the ordinary and natural use of the phrase, one would not be said to be "carrying a watch" that was under clothes in a closed bag in the trunk of an automobile.

[11] The *O.E.D.* identifies two overarching categories of uses of the word "carry," and defines them as "I. To transport, convey while bearing up[,]" *id.* at 919 (2d ed. 1989) and "II. To support, sustain[,]" *id.* at 920. In explaining the history of the word the *O.E.D.* states:

> From the radical meaning which includes at once 'to remove or transport,' and 'to support or bear up,' arise two main divisions, in one of which (I.) 'removal' is the chief notion, and 'support' may be eliminated . . . while in the other (II.) 'support' is the prominent notion, and 'motion' (though usually retained) may entirely disappear.

Id. at 919. Under the second category of "carrying," the *O.E.D.* includes the definition, "[t]o bear, wear, hold up, or sustain, as one moves about; habitually to bear about with one (*e.g.*, any ornament, ensign, personal adjunct; also a name or other distinction.)" *Id.* at 921.

[12] The First Circuit, which relied exclusively on definitions provided in *Webster's Third*, referred only to one portion of this definition in supporting its decision below, while entirely ignoring and neglecting to mention a second portion of this definition, "[t]o hold, wear, or have upon one's person <he *carries*> a watch." J.A. 108.

although "carry" may mean "transport" for some purposes, that term can also mean "bear on the person," and in the latter sense does not incorporate movement as an essential component of "carry[ing]." Above all, these definitions do not support an argument that "carries a firearm" means "transports a firearm."

Nor does the First Circuit's reasoning support its conclusion that "carries a firearm" means "transports a firearm." The First Circuit quoted a part of one dictionary's definition of "carry"[12] and concluded that the definition of carry "clearly includes transport of a firearm by

car[.]" J.A. 108. The First Circuit bolstered this conclusion by looking to the etymology of the word "carry":

> Orig. indicating movement by car or cart, it is a natural word to use in ref. to cargoes and loads on trucks, wagons, planes, ships or even beasts of burden.

J.A. 108 (citing *Webster's Third New International Dictionary*). However, the First Circuit omitted the next two sentences included in its source that explained that the definition of carry had evolved so that its meaning is no longer confined to the etymological source:

> It has spread widely from its original meaning and may be substituted in most situations for the following words. BEAR in this sense may more strongly suggest maintaining or holding aloft the weight involved, more incidentally the fact of its being moved. . . .

Webster's Third New International Dictionary, at 343. The language omitted by the First Circuit makes it clear that "carry" is not simply synonymous with "transport."[13]

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[13] The First Circuit's holding adopts a "transportation" test, despite the fact that § 924(c) itself makes no reference to motion or vehicles. Moreover, there is no express language in the statute limiting its application to predicate crimes committed, at least in part, through movement. One who "carries" a firearm, in the sense that it is on his person, is subject to this statute if he sits motionless in a room, or in the woods, and guards drugs he intends to distribute. To read the word "carries" as requiring transportation does not reach such scenarios. Still more strained is a reading of "carries" that is bifurcated, encompassing both having a firearm on one's person (without any requirement of movement) and transporting a firearm in a vehicle but not on one's person (where movement is necessary). These two meanings are to be found, listed separately, in the dictionaries, but no single listing encompasses

The First Circuit erroneously chose to focus on the word "carries" in isolation, and not as part of the phrase "carries a weapon."[14] The First Circuit dismissed *Black's Law Dictionary*'s definition of "carry[ing] arms or weapons" as "inapposite," reasoning "We strongly doubt

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within a single meaning of "carry," bearing on the person if not in a vehicle, and transporting if in a vehicle. There is no explanation for the creation of such a hybrid nonce-meaning other than the desire to reach a particular result.

Others who contend that the statute's "plain language" requires a broad definition of "carry" that encompasses all "transportation" argue that "just as there are different ways to use a firearm, there are also different ways to carry it. One way is in your hand, another is to carry it in the trunk of your car." *Foster*, 1998 WL 2521, at *9 (Trott, J. dissenting). Judge Trott asserted that "[c]ars . . . are designed to carry people and things from place to place. Cars function as extensions of the person when it comes to transporting objects. A car is simply a means of transportation – like a holster." *Id.* at 10. Aside from the fact that this analysis fails to address or resolve the dichotomy between "carrying a firearm" in a holster (requiring no motion) and "carrying a firearm" in a car (requiring motion), Judge Trott fails to acknowledge the obvious fact that a gun carried in a holster presents a far greater danger to others than an inaccessible gun in the trunk of a car. The two receptacles are simply not equivalent. This is made clear by considering that yet another means of "carrying" a gun – in the sense of transporting it – is to carry it on an ocean liner. If the gun is in your stateroom on level one, and you are conducting a drug transaction in the seller's stateroom on level six, it is difficult to see how the ocean liner is like a holster. In fact, the ocean liner is more like a hotel.

[14] Similarly, when the Fourth Circuit, which opted for a broad definition of carry, went to the dictionaries, it chose to ignore that § 924(c) used the term within the phrase, "carries a firearm," and failed to acknowledge the *Black's* definition of "carry[ing] arms or weapons." *See United States v. Mitchell*, 104 F.3d 649, 653 (4th Cir. 1997).

. . . that Congress . . . meant to exclude a defendant who transports the gun in his car, rather than on his person[.]" J.A. 109. This explanation for bypassing the plain and ordinary meaning of the phrase "carries a firearm" lacks persuasive force.

B. Analyzing § 924(c) In The Context Of The Entire Statutory Scheme Confirms That "Carries A Firearm" Should Be Accorded A Precise And Specific Meaning.

As the Court recognized in *Bailey*, 116 S. Ct. at 506, the definition of a word in a statute is a function of "not only [of] the bare meaning of the word but also its placement and purpose in the statutory scheme." Each term in a statute should be read in light of the surrounding provisions of the law as a whole. *John Hancock Mutual Life Insurance Co. v. Harris Trust & Savings Bank*, 510 U.S. 86, 94 (1993). As the Court reiterated in *Smith v. United States*:

> "Statutory construction . . . is a holistic endeavor. A provision that may seem ambiguous in isolation is often clarified by the remainder of the statutory scheme – because the same terminology is used elsewhere in a context that makes its meaning clear, or because only one of the permissible meanings produces a substantive effect that is compatible with the rest of the law."

508 U.S. 223, 233-234 (1993) (quoting *United Savings Ass'n of Texas v. Timbers of Inwood Forest Associates, Ltd.*, 484 U.S. 365, 371 (1988)). Just as the First Circuit erred by looking at the word "carry" in isolation, so, too, it committed error by failing to look at the statutory scheme of which § 924(c) is a part. Review of that scheme fortifies the

conclusion that Congress intended the term "carries a firearm" to refer to firearms carried on the person.

The statutory scheme reveals that Congress did not intend "carry" to mean either "transport" or "possess." This is clear because Congress described conduct involving possession and transportation of firearms in motor vehicles and other modes of transport with terms other than "carries a firearm." In addition, the statutory scheme reflects that Congress developed a penalty scheme to respond to its assessment of the comparative harm or danger associated with particular acts. Within this scheme, § 924(c) carries potentially the stiffest of penalties, a fact that militates against construing the terms of that section – use and carry a firearm – too broadly, in derogation of their plain meanings.

1. Congress Used The Word "Transport," Not "Carry," To Penalize Transportation Of Firearms.

A review of the statutory scheme set forth in § 924 and in Chapter 44 of Title 18 as a whole, lends force to the conclusion that "carry" in the § 924(c) context "uses or carries a firearm" cannot be read as broadly as the First Circuit read it and as the government would have it read by the Court. Congress, by its careful choice of language in defining what conduct to penalize, and the degree to which different forms of conduct would be punished, precluded a broad definition of the term "carry" that would be synonymous with either "transportation" or "possession," words that Congress chose to utilize in other related statutory sections, but not in § 924(c).

In § 924, "carry" does not mean "transport" and "carries a firearm" does not mean "transports a firearm."

The statutory sections surrounding § 924(c) indicate that if Congress had intended to proscribe the transport of weapons in vehicles, or in some subset of vehicles, during or in relation to drug crimes or crimes of violence, it had at hand the precise vocabulary to do so. For example, Congress used "transport," "ship," "transfer," and "deliver" frequently in §§ 922 and 924 to proscribe the movement of firearms in interstate commerce. "Transport," "transporting" and "transportation" alone are used in numerous subsections of the gun control statutes.[15] Section 924(b), for example, proscribes, *inter alia*, transporting a firearm in interstate commerce with intent that a felony be committed therewith. Congress clearly knew how to criminalize the movement of weapons, and in § 924(b) did so by using the verb "transport." Had Congress intended to prohibit transportation of weapons, during and in relation to a violent crime or drug offense, it would not have used the distinct term "carries" in § 924(c) to describe the conduct it had described with the word "transport" in § 924(b) and elsewhere.[16] *See Bailey*, 116 S. Ct. at 506. ("[W]e read § 924(c)(1) with the assumption that Congress intended each of its terms to have meaning.")

This point was articulated by the ultimately successful dissenters to the D.C. Circuit's *en banc* opinion in

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[15] *See, e.g.*, §§ 922(a)(1)(A), 922(a)(1)(B), 922(a)(2), 922(a)(3), 922(a)(4), 922(a)(5), 922(e), 922(f)(1), 922(g), 922(h), 922(i), 922(j), 922(k), 922(n), 924(b), 925(a)(1), 925(a)(2), 925(a)(4), 925(c), and 926A.

[16] As the Ninth Circuit noted, "If Congress wants us to put people like [the defendant] in prison for a longer time, it can rewrite the law to give us clearer instructions, perhaps by using the word 'transport' in § 924(c)(1) as it does in various other sections of the firearm statutes." *Foster*, 1998 WL 2521, at *5.

Bailey, Judges Williams, Silberman and Buckley, who concluded that "carry" did not mean "transport" and that immediate accessibility was required for "carrying," based in part on the statutory scheme:

> [We] do not believe § 924(c) can properly be extended . . . [to a] defendant who, like Bailey, transports the weapon in his car but is not shown to have had immediate access at any time while he was committing his drug trafficking offense. The effect would be to have § 924(c) embrace virtually every instance where a drug trafficker transports a weapon; in view of Congress's provision of a separate penalty in an adjacent section for anyone who "transports" a weapon with intent to commit a crime punishable by as much as a year's imprisonment, 18 U.S.C. § 924(b), that seems an improbable duplication. Rather, consonant with an active notion of "use," with the Senate Report's example of a weapon carried in the defendant's pocket, and with the principle of the "constructive possession" cases that the defendant may use the gun on a moment's notice, the word "carry" must entail immediate availability. Thus, the *gun locked in the trunk of Bailey's car was not accessible enough to support a conviction for carrying* the gun during and in relation to his possession with intent to distribute drugs.

36 F.3d 106, 125 (D.C. Cir. 1994) (emphasis added) (citations omitted), *rev'd*, 116 S. Ct. 501 (1995).

In addition to the prohibitions against transporting firearms, Congress elsewhere prohibited "shipping," "smuggling," "delivering," "bringing" and "importing,"

of firearms under various circumstances.[17] Congress did not include any of these terms, all indicative of movement or locomotion, as part of § 924(c), and could not have meant "carries" to duplicate any of these terms used elsewhere in the same statute.

2. Congress Used The Word "Possess," Not "Carry," To Penalize Possession Of Firearms.

"Carry" does not mean "possess." The Court in *Bailey* ruled that "mere possession by a person who commits a drug offense" does not constitute "use" within the meaning of § 924(c). 116 S. Ct. at 508. The Court explained, "If Congress had intended to deprive 'use' of its active connotations, it could have simply substituted a more appropriate term – 'possession' – to cover the conduct it wished to reach." *Id.* The same analysis applies to the term "carries."[18] If Congress had intended to proscribe custody or control of a firearm, it would have done so unambiguously by substituting – or adding – the term "possesses" to § 924(c). In numerous sections of the gun

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[17] *See, e.g.*, §§ 922(a)(1)(A), 922(a)(1)(B), 922(a)(2), 922(a)(5), 922(a)(8), 922(b), 922(e), 922(f)(1), 922(f)(2), 922(g), 922(i), 922(j), 922(k), 922(l), 922(n), 922(p)(1), 922(p)(6), 922(s)(1), 922(x), 924(a)(1)(C), 924(b), 924(d)(1), 924(k), 925(a)(1), 925(a)(2), 925(a)(3), 925(a)(4), 925(c), 925(d) and 926A.

[18] Similarly, Justice Breyer, in his dissent from the First Circuit's decision in *United States v. McFadden*, stated that "the ordinary meanings of the words 'use' and 'carry'. . . . connote activity beyond simple possession." 13 F.3d 463, 467 (1st Cir. 1994).

statutes, Congress used the term "possess" without any reference to "carrying."[19]

Portions of the statutory scheme that refer to both "possession" and "carrying" elucidate that the proper scope of each term is restricted to its respective ordinary and natural meaning. For example, in § 929, Congress addressed "using," "carrying," and "possessing." That section provides:

> Whoever, during and in relation to the commission of a crime of violence or drug trafficking crime . . . *uses or carries* a firearm and is in *possession* of armor piercing ammunition capable of being fired in that firearm, shall . . . be sentenced to a term of imprisonment for not less than five years.

Section 929(a)(1) (emphasis added). This section demonstrates the fact that Congress intended carry to have a meaning distinct from possess, and had it intended to reach all possession under § 924(c), it would have done so.[20]

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[19] *See, e.g.*, §§ 922(g), 922(h)(1), 922(j), 922(k), 922(p)(1), 922(p)(6), 922(q)(2)(A), 922(q)(2)(B), 922(v)(1), 922(w)(1), 924(a)(6)(A)(ii)(I), 925(a)(1), 925(c), 930(a), 930(b), 930(e), and 930(f).

[20] Similarly, in § 924(a)(6)(B)(ii), punishment is prescribed for one who knowingly provides a handgun or handgun ammunition to a juvenile, "knowing or having reasonable cause to know that the juvenile *intended to carry or otherwise possess* or discharge or otherwise use the handgun or ammunition in the commission of a crime of violence. . . . " (Emphasis added). Congress, in this subsection, used "carry" as a sub-set of possession, not as a co-extensive term.

3. Congress Used The Words "Transport" And "Possess," Not "Carry," To Regulate Transportation And Possession Of Firearms In Vehicles.

The statutory scheme also indicates that Congress explicitly regulated, in those circumstances where it wanted to, the combination of firearms and motor vehicles, contradicting the First Circuit's notion that the ubiquity of cars compels equating "carries a firearm" with "transporting a firearm" when cars are involved. J.A. 109. For example, Congress elsewhere specified a class of vehicles in prohibiting the "transport" or "shipment" of firearms on common carriers.[21] Congress thus expressly regulated "transporting firearms in a vehicle," but did not use the term "carry" to do so.

In § 926A, Congress used a panoply of terms relevant to the instant inquiry, revealing both that Congress intended to distinguish among transporting, possessing, and carrying, and that it knew how to specifically address automobiles:

> [A]ny person who is not otherwise prohibited by this chapter from transporting, shipping, or receiving a firearm shall be entitled to *transport* a firearm for any lawful purpose from any place where he may lawfully *possess* and *carry* such firearm to any other place where he may lawfully *possess* and *carry* such firearm if, during such *transportation* the firearm is unloaded, and neither the firearm nor any ammunition being *transported* is readily accessible or is directly accessible from the passenger compartment of such *transporting* vehicle: *Provided*, That in the

[21] *See, e.g.*, §§ 922(e) and (f) (dealing with transport or shipment of weapons on common or contract carriers).

> case of a vehicle without a compartment separate from the driver's compartment the firearm or ammunition shall be contained in a locked container other than the glove compartment or console.

18 U.S.C. § 926A (some emphasis added). Here, Congress directly addressed transporting firearms in a motor vehicle. Congress did not refer to carrying a firearm in a vehicle in § 926A; it referred to "transport[ing] a firearm," using the ordinary and natural sense of the word transport to describe movement of a firearm from one place to another. Surely, where Congress can with such minute detail specify what is licit transportation of a firearm in a vehicle, it would have done the same for illicit transportation had it intended § 924(c) to proscribe transportation of firearms in vehicles.

Congress repeatedly distinguished in Chapter 44 among the transportation, possession and carrying of weapons. That it did so refutes the First Circuit's reasoning in holding that "carry" means "transport" in § 924(c). Even outside Chapter 44, Congress addressed explosives and dangerous weapons aboard vessels as follows: "Whoever brings, carries, or possesses any dangerous weapon . . . on board of any [designated] vessel . . . [without permission] . . . shall be [punished]." 18 U.S.C. § 2277(a). Similarly, in addressing explosives on certain passenger vessels, Congress punished "[w]hoever . . . takes, carries or has on board of any such vessel [certain explosives.]" 18 U.S.C. § 2278. If "carries" means merely possesses or transports, the phrase "has on board" is reduced to surplusage. These statutes demonstrate that Congress considered "carrying" distinct from "bringing," "possessing," "taking" or "having" a weapon on board a vessel; similarly, in § 924(c), "carrying" is distinct from

"bringing," "possessing," "taking," "transporting," or "having" in a vehicle.

Unlike the statutes discussed above, there is no mention of automobiles or other vehicles in § 924(c), and no mention of activities other than using or carrying. Had Congress wanted to proscribe transporting weapons in vehicles in § 924(c), it would have employed the specific terms it used elsewhere in the statute; that it did not serves as an indication of the intended limits on the scope of the term "carry."[22]

4. The Gradations Of Punishment Set Forth In The Statutory Scheme Reinforce The Conclusion That "Carry" Was Not Intended To Be Given An Overly Broad Definition.

Consideration of the gradations of punishment set out by Congress in the statutory scheme of § 924 for various transgressions further supports the ordinary meaning of "carries a firearm" that petitioners advocate. Section 924 prescribes penalties for a myriad of firearm offenses and offenses in which firearms play some role, as well as for forfeiture of firearms involved in such offenses. Congress set out in § 924 a painstakingly

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[22] The dissent in *Foster* glosses over this obvious omission, writing: "This is not a 'puzzle,' and we do not need 'clues' to solve it. It's 'carry,' that's all, and it's carry in a vehicle during and in relation to a drug trafficking crime." 1998 WL 2521, at *6 (dissenting opinion). This "analysis" ignores that the statute does not read "carry in a vehicle;" it reads "carr[y] a firearm." § 924(c)(1). It also fails to consider that the legislature *could have* included "carry in a vehicle" during and in relation to a drug trafficking crime, but did not. The ease with which Congress accomplished this end elsewhere in the statute strongly suggests that this was not the meaning it intended in § 924(c).

detailed program of criminal responsibility, providing for penalties that range from one year[23] to death. Only two subsections provide for mandatory minimum sentences – §§ 924(c) and 924(e)(1)[24] – and only two subsections provide that sentences imposed thereunder be made consecutive to any other sentences imposed – §§ 924(a)(4)[25] and 924(c). Section 924(c), alone of all the penal provisions in this statute, calls both for a mandatory minimum sentence (which may be five, ten, twenty or thirty years, or life, depending on the type of weapon involved and

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[23] One year penalties are prescribed for violations by licensees of record-keeping provisions, § 924(a)(3), and of criminal record-check violations, § 924(a)(5), and for the sale, delivery or other transfer by any person of a handgun or ammunition to a juvenile, § 924(a)(6)(A), or possession thereof by a juvenile, § 924(a)(6)(B)(i). Interestingly, a licensee making a false statement under § 924(a)(3) is subject to a one year penalty, any other person making such a false statement under § 924(a)(3) is subject to a five year penalty, and anyone who makes a false statement to a licensee in connection with the acquisition of a firearm likely or intended to deceive the licensee regarding a fact material to the lawfulness of the acquisition is subject to a ten year penalty under § 924(a)(2). This increasingly harsh penalization of false statements, first if one is a customer, then if the transaction is a sale or transfer, is one example of Congress devising a system of gradations of punishment to fit the gradations of danger it perceived.

[24] Section 924(e)(1) penalizes possession of a firearm by convicted felons, and certain others, who have three previous convictions of serious drug offenses or crimes of violence. This recidivist provision imposes a mandatory minimum fifteen year sentence, but is not necessarily consecutive to other sentences imposed.

[25] Section 924(a)(4) penalizes possession of a firearm in a school zone. It was declared unconstitutional in *United States v. Lopez*, 514 U.S. 549 (1995).

whether the defendant has previously been convicted under § 924(c)) and also for that sentence to be made consecutive to the sentence imposed for the predicate felony. Thus, § 924(c) calls for potentially the harshest penalties found in § 924, save § 924(j), which has § 924(c) as its predicate offense.[26]

Congress established a nonmandatory ten year penalty for the movement, including transportation, of firearms for an *intended future* use. § 924(b) (penalizing one who "ships, transports or receives" a firearm or ammunition with intent himself to commit a felony, or with reason to know that another intends to use the firearm or ammunition are to commit a felony).[27] In contrast, § 924(c) focuses on a firearm's *actual present* use, or presence on the person ready for present use, and imposes mandatory penalties.

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[26] The death penalty is authorized, in § 924(j), if the defendant causes the death of a person through the use of a firearm in the course of a violation of § 924(c).

[27] Like § 924(b), other provisions in the statutory scheme establish a penalty of up to ten years for activities that enable *future*, as opposed to *present*, use. For example, § 924(a)(6)(B)(ii) penalizes "selling, delivering or otherwise transferring" a handgun to a juvenile, where the defendant has reasonable basis to know the juvenile intends to possess or use the gun in a crime of violence. Section 924(g) penalizes one who "travels" across state lines to "acquire or transfer," or attempt to do so, firearms in furtherance of an intent to violate certain laws. Section 924(h) penalizes one who "transfers" a firearm to another, knowing it will be used in a crime of violence or controlled substance offense. And § 924(k) penalizes one who "smuggles or brings into" the United States a firearm, or attempts to do so, with the intent to engage in, or promote, violations of controlled substance laws or crimes of violence.

These gradations in punishment included in the statutory scheme reflect Congress' judgment about the relative risks associated with different behaviors. The differences in penalties – a mandatory minimum, consecutive sentence for violation of the "use or carry" prohibition in § 924(c), as compared to a nonmandatory, nonconcurrent sentence for a violation of provisions dealing with movement of firearms for intended future criminal use – demonstrates that § 924(c) reaches conduct Congress deemed to be particularly dangerous. That § 924(c) does not include transportation for future criminal use is made clear by Congress' inclusion of other provisions covering such conduct and carrying lesser penalties. Section 924(c) imposes its harsher penalty where a gun is actively employed ("used") in criminal activity, or where it is on the person of the perpetrator ("carried") and thus constantly with the perpetrator, available throughout the course of a drug transaction or a violent crime for use on an instant's notice.

It is also worthy of note that the actions of petitioners could have been the subject of enhanced penalties under the sentencing guidelines. Petitioners' possession of firearms potentially subjected them to a two level increase under the sentencing guidelines, pursuant to U.S.S.G. § 2D1.1(b)(1). Such an upward adjustment would have resulted in substantial increases in the defendants' sentences. *See United States v. McFadden*, 13 F.3d 463, 467 (1st Cir. 1994) (Breyer, J. dissenting) (noting that the two level guideline enhancement would increase the sentence by 30-40%). This guideline mechanism, also a part of Congress' penalty scheme, is the appropriate means to increase penalties for drug offenders who merely possess weapons but do not use or carry them.

C. The Origins And Legislative History Of § 924(c) Demonstrate That Congress Intended To Criminalize Only Bearing A Firearm On The Person.

Since the language and structure of § 924 demonstrate that "carrying a firearm" during and in relation to a crime of violence or drug trafficking offense reaches only carrying on the person, there is no need to examine the legislative history of the provision. However, should the Court conclude that § 924(c)'s meaning is ambiguous, it can look to what little legislative history there is,[28] which also demonstrates that Congress intended "carry a firearm" to mean carrying a weapon on the person.[29]

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[28] *See United States v. Foster*, 1998 WL 2521, at *4 n.8 (9th Cir. January 5, 1998) (en banc) ("There is mercifully little legislative history on 'carry' to burden our discussion.") *See also Simpson v. United States*, 435 U.S. 6, 13-14, 13 n.7 (1978) (describing origins of provision and noting that because the eventual language of § 924(c) was "passed on the same day it was introduced on the House floor, it is the subject of no legislative hearings or committee reports").

[29] Justices Scalia, Kennedy and Thomas, in their concurring opinion in *United States v. R.L.C.*, 503 U.S. 291 (1992), maintain that looking to legislative history is inconsistent with the purposes of the rule of lenity: to assure that criminal statutes provide "fair warning . . . to the world in language the common world will understand, of what the law intends to do if a certain line is passed," *id.* at 308 (citing *McBoyle v. United States*, 283 U.S. 25, 27 (1931)), and to assure that "society, through its representatives, has genuinely called for the punishment to be meted out," *id.* at 309.

1. The Gun Control Act Of 1968.[30]

In 1968, responding to public outcry in the wake of political assassinations, riots, and other social unrest involving guns, Congress passed two laws in quick succession: the Omnibus Crime Control and Safe Streets Act of 1968, Pub. L. No. 90-351, 82 Stat. 197; and the Gun Control Act of 1968, Pub. L. No. 90-618, § 102, 88 Stat. 1213, 1224.[31] Congress debated and passed the latter statute in the immediate aftermath of the assassinations of Senator Robert F. Kennedy and Dr. Martin Luther King, Jr. *See Busic v. United States*, 446 U.S. 398, 404 n.9 (1980); *see also* 114 Cong. Rec. 21,771, 21,783, 21,800 (1968).

When first enacted, § 924(c) penalized using and carrying a gun during a federal felony:

> Whoever – (1) uses a firearm to commit any felony which may be prosecuted in a court of the United States, or (2) carries a firearm unlawfully during the commission of any felony which may be prosecuted in a court of the United States, shall be sentenced to a term of imprisonment for not less than one year nor more than 10 years.

Pub. L. No. 90-618, § 102, 82 Stat. 1213, 1224. What legislative history there is indicates that Congress

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[30] Originally enacted as part of the Gun Control Act of 1968, § 924(c) has been amended on numerous occasions. Nevertheless, only three of those amendments (in 1984, 1986, and 1988) bear, in any way, on the scope of liability for "us[ing] or carry[ing]" a firearm. *See* discussion *infra* n.33 and part I.C.2.

[31] *See* H.R. Rep. No. 1577, 90th Cong., 2d Sess. 7, *reprinted in* 1968 U.S.C.C.A.N. 4410, 4412-4413; S. Rep. No. 1501, 90th Cong., 2d Sess. 22-23 (1968).

intended "carries a firearm" to have a specific and tailored definition. *See United States v. Santos*, 84 F.3d 43, 46-47 ("We have recognized that '[n]either the legislative history of § 924(c)(1) nor case law in this circuit suggest[s] that the term "carry" should be construed as having any meaning beyond its literal meaning.' Accordingly, we have construed that term narrowly"), *modified*, 95 F.3d 116 (2d Cir. 1996).

Drug offenses were not explicitly mentioned in the original version of § 924(c).[32] Rather, the legislative history of the 1968 act indicates that the crimes of concern were murders, assaults, rapes, burglaries and robberies. *See, e.g.*, 114 Cong. Rec. 21,800, 22,230, 22,235 (1968). The offenses addressed by Congress have no special association with automobiles and no such associations are to be found in the legislative history. This legislative history belies the First Circuit's argument below that Congress

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[32] It was not until 1986, as part of the *Firearm Owners' Protection Act*, that Congress expanded § 924(c)'s predicate offenses to include any "drug trafficking offense," defining those offenses as "any felony violation of Federal law involving the distribution, manufacture, or importation of any controlled substance." Pub. L. No. 99-308, § 104, 100 Stat. 449, 457. In 1988, in the *Anti-Drug Abuse Act*, Congress broadened the definition of "drug trafficking crime" to include "any felony punishable under the Controlled Substances Act (21 U.S.C. 801 et seq.), the Controlled Substances Import and Export Act (21 U.S.C. 951 et seq.), or the Maritime Drug Law Enforcement Act (46 U.S.C. App. 1901 et seq.)." Pub. L. No. 100-690, § 6212, 102 Stat. 4181, 4360.

Petitioners have been unable to find *any* evidence in the slight legislative history of either the 1986 or 1988 Acts to suggest that Congress considered how the "carry" or "use" provisions would function when applied to predicate drug offenses.

must have intended to "includ[e] transport by vehicle" in the definition of the word "carry" given the ubiquity of vehicular involvement in drug offenses. J.A. 109.[33] Given that drug offenses were expressly named as predicate acts only in 1986, it is unlikely that the use of cars in drug transactions influenced Congress' understanding of the scope of "carry" when the statute was enacted originally eighteen years earlier.

Most importantly, the word "carry" is used, throughout the legislative history, to refer to circumstances in which a weapon is on the person. For example, in addressing the concern that the proposed legislation might criminalize incidental "carrying," unrelated to a predicate felony, the hypothetical applications of the act discussed reveal that "carrying" was taken to mean carrying on the person. *See, e.g.*, 114 Cong. Rec. 21,788 ("Suppose a [person licensed to carry a pistol] pushes somebody . . . and he does not use the pistol but *carries it on his hip.*") (emphasis added); *id.* at 21,788-21,789 ("if I push somebody in the street or punch somebody in the nose –

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[33] The First Circuit wrote:

> We strongly doubt – given the omnipresence of automobiles in today's world and in drug dealing, and given the basic meaning of "carry" as including transport by vehicle – that Congress, in prescribing liability for anyone who "uses or carries" a firearm during or in relation to a drug trafficking offense, meant to exclude a defendant who transports the gun in his car, rather than on his person, for use in a drug transaction.

J.A. 109. The legislative history of § 924(c) shows this argument to be inaccurate speculation.

with no use of the pistol, but merely *carrying* the pistol . . . ") (emphasis added); *id.* at 22,239 (indicating the desire to "make a criminal who *takes a gun in his hand* realize that he is going to be prosecuted to the fullest extent of the Federal law . . . for merely *carrying* a gun") (emphasis added).

2. The Comprehensive Crime Control Act Of 1984.

In 1984, Congress undertook a substantial reworking of § 924(c)(1).[34] Among other things, the amended statute combined the "use" and "carry" prongs of the original provision, eliminated the requirement that the firearm be carried "unlawfully,"[35] added the requirement that it be carried or used "during and in relation to" the predicate offense[36] and changed the predicate offense from "any

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[34] As rewritten, § 924(c) read, in pertinent part:

> Whoever, during and in relation to any crime of violence, including a crime of violence which provides for an enhanced punishment if committed by the use of a deadly or dangerous weapon or device, for which he may be prosecuted in a court of the United States, uses or carries a firearm, shall, in addition to the punishment provided for such crime of violence, be sentenced to imprisonment for five years.

Pub. L. No. 98-473, § 1005(a), 98 Stat. 1837, 2138, 2139.

[35] Although the 1984 amendment of § 924(c) eliminated the requirement that carrying be "unlawful," this does not suggest that Congress altered its understanding of what constituted "carrying," but only that those duly licensed to carry weapons for the first time came within the prohibitions of § 924(c).

[36] Insofar as Congress intended to change the scope of carrying liability by adding the phrase "in relation to,"

felony" to "any crime of violence." The scant legislative history fails to elaborate on most of these changes.[37]

Nevertheless, a Senate report sheds light on the intended contours of § 924(c) liability under the "carry" prong:

> Evidence that the defendant had a *gun in his pocket* but did not display it, or refer to it, could . . . support a conviction for *"carrying"* a firearm in relation to the crime if from the circumstances or otherwise it could be found that the defendant intended to use the gun if a contingency arose or to make his escape.

S. Rep. No. 225, at 314 n.10 (1983) (emphasis added). This language helps elucidate congressional meaning regarding the intended scope of "carrying a firearm," *i.e.*, it is restricted to the ordinary and natural sense of bearing on the person.

Congress clearly meant to limit, not expand, the statute's reach by excluding use or carrying of a firearm not related to the predicate offense.

[37] The legislative history indicates that the goal of the amendment was to address "drafting problems" and "interpretations of the section in recent Supreme Court decisions" that had "greatly reduced its effectiveness as a deterrent to violent crime." S. Rep. No. 225, 98th Cong., 1st Sess. 312 (1983), *reprinted in* 1984 U.S.C.C.A.N. 3182, 3490; *see also id.* at 313, 1984 U.S.C.C.A.N. at 3491. The "drafting problems" Congress wished to correct pertained to sentencing, not the definition of the offense. S. Rep. No. 225 at 313, 1984 U.S.C.C.A.N. at 3491. The decisions of the Court that Congress wished to undo were *Busic v. United States*, 446 U.S. 398 (1980), and *Simpson v. United States*, 435 U.S. 6 (1978) (holding that a defendant's sentence could not be enhanced pursuant to both the underlying offense and § 924(c)).

D. Mere Transportation Of A Firearm For Use Does Not Constitute Carrying A Firearm Under § 924(c).

The courts of appeal that have sided with the First Circuit maintain the broadest possible concept of "carry," purporting to avoid the conclusion that "carry" is synonymous with "possess" on the one hand, or with "transport" on the other, by asserting that it means the intersection of the two: possession, constructive or actual, together with transportation. *See, e.g., United States v. Mitchell*, 104 F.3d 649, 654 (4th Cir. 1997) (defendant "knowingly possessed and transported the firearm in his automobile").[38] There are several fatal flaws in this "possession and transportation" rendering of "carrying."

First, as the Court stated in *Bailey*, each of the two prongs of § 924(c), use and carrying, must be defined narrowly enough that neither swallows up the other. 116 S. Ct. at 508. In the context of a moving vehicle, the First Circuit's definition of "carry" swallows entirely any meaningful role for "use," since *any* possession of the firearm under that definition constitutes "carrying."

Second, construing "carries a firearm" to mean "transport and possess" is indistinguishable from construing it as simple "transporting" in the context of § 924(c). It is hard to imagine how one could transport a weapon during and in relation to a drug offense or crime

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[38] *Accord United States v. Holland*, 116 F.3d 1353, 1359 (10th Cir.) (upholding conviction under § 924(c) for "carrying" where gun was transported in vehicle operated by defendant), *cert. denied*, 118 S. Ct. 253 (1997); *United States v. Muscarello*, 106 F.3d 636 (5th Cir.), *cert. granted*, 118 S. Ct. 621 (1997); *United States v. Molina*, 102 F.3d 928 (7th Cir. 1996); and *Wilson v. United States*, 125 F.3d 1087 (7th Cir. 1997).

of violence without exercising dominion and control over it, which is all that is required for possession. The definition of "carry a firearm" adopted by the First Circuit thus reduces to "transport." However, Congress used "transport" elsewhere in § 924 and in Chapter 44, and consequently meant "carry" to mean something different when it chose that term in § 924(c). *See* discussion *supra* part I.B.1.

Third, the First Circuit definition of "carry" – transport – does not encompass a stationary defendant with a gun concealed on his person. This is the paradigm case of carrying a firearm as noted by the Court in *Bailey*, 116 S. Ct. at 507, as well as in the legislative history, *see* discussion *supra*, part I.C, although it involves no element of transportation. *See also Broadway v. United States*, 104 F.3d 901, 905 (7th Cir. 1997) ("if keeping a gun in your pants pocket does not constitute 'carrying' a gun, we cannot imagine what would").

Two courts of appeal that have adopted the broad definition "transportation plus possession" have addressed this problem by rendering "carrying in a motor vehicle" a special case, different from carrying on the person.[39] The "possession and transportation" test

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[39] In *United States v. Rivas*, the Fifth Circuit made this dichotomy explicit: "[W]e . . . recognized that carrying on the person is different from carrying in a vehicle 'because the means of carrying is the vehicle itself.' " 85 F.3d 193, 195 (5th Cir.), *cert. denied*, 117 S. Ct. 593 (1996). In *Muscarello*, the companion case to petitioners' case, the Fifth Circuit observed that "what constitutes "carrying" under § 924(c) when the firearm is possessed in the motor vehicle differs substantially from what constitutes carrying a firearm in a non-vehicle situation." 106 F.3d at 639. The Seventh Circuit has implicitly distinguished

requires taking the phrase "carries a firearm" and formulating *two distinct* definitions, one for when the firearm is actually on the person of the defendant, another when it is not. This result-driven approach is without justification on any basis other than the desire to bring every form of possession in a vehicle within the ambit of § 924(c). It is a far cry from simply discerning the plain meaning of the phrase "carries a firearm."

In light of a lengthy statute setting forth a detailed and considered regulatory scheme for firearms, in which Congress has variously regulated possession, transportation, receipt, importation, and shipment of firearms, Congress' regulation of carrying a firearm in § 924(c) should be given a singular, precise meaning – not one meaning for defendants in vehicles and another, quite different one for defendants not in vehicles. As discussed *supra* part I.B.3, Congress knows how to regulate the movement of firearms, even the movement of firearms in vehicles, and how to distinguish between shipment on common carriers and other transportation in vehicles. Had Congress intended to penalize "carrying" in one sense of the word ("transporting") if the defendant was in a vehicle, and another ("bearing on the person") if the defendant

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between vehicular and non-vehicular carrying, affirming as a paradigm case of carrying one in which the defendant was found lying on stairs, with "50 packets of crack cocaine in one pocket and a gun in the other," *Broadway v. United States*, 104 F.3d 901, 902 (7th Cir. 1997), even while reiterating its "simple definition of 'carry' – 'to move while supporting: transport,' " *id.* at 905. The First Circuit's appeal to the special character of automobiles in drug transactions, *see* note 34 *supra*, may be an effort to justify creating a dichotomy between carrying on the person and carrying in a vehicle, in contravention of the statutory scheme.

was not in a vehicle, Congress would have used both of these terms to clearly express its intent, as it did elsewhere in the statute. Section 924(c) would then have read, "Whoever . . . uses, carries, or transports in a vehicle a firearm shall be punished. . . . " This Congress did not do. The Court should not substitute its will for that of Congress and effectively rewrite § 924(c) to add a prohibition against the transportation of firearms.[40]

E. If The Court Finds The Phrase "Carries A Firearm" At All Ambiguous, The Rule Of Lenity Requires § 924(c) Be Construed In The Petitioners' Favor.

The language, structure and legislative history of § 924(c) forcefully support the meaning assigned to "carries a firearm" propounded by petitioners. But even if the

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[40] It is noteworthy that twenty-two states have enacted bifurcated carrying statutes, criminalizing the carrying of concealed or unpermitted weapons on the person, and also criminalizing transporting concealed or unpermitted weapons in a motor vehicle. *See, e.g.* Ariz. Crim. Code § 13-3102.A.1 & 2 (Supp. 1997) ("1. Carrying a deadly weapon . . . concealed on his person; or 2. Carrying a deadly weapon . . . concealed within immediate control of any person in or on a means of transportation."); Cal. Penal Code § 12025(a)(1), (2) (Deering Supp. 1997) ("A person is guilty of carrying a concealed firearm when he or she . . . (1) Carries concealed within any vehilce which is under his or her control or direction any pistol or firearm capable of being concealed upon the person. (2) Carries concealed upon his or her person any pistol, revolver, or other firearm capable of being concealed upon the person."); Mass. Gen. Laws c. 269, § 10(a) (1990 & Supp. 1997) ("Whoever, . . . knowingly has in his possession; or knowingly has under his control in a vehicle; a firearm . . . "). These legislatures found no difficulty in spelling out that transporting a firearm in a vehicle, as well as bearing a firearm on the person, were both prohibited.

Court disagrees, "[a]t the very least, it may be said that the issue is subject to some doubt." *Adamo Wrecking Co. v. United States*, 434 U.S. 275, 284-285 (1978). In these circumstances, "where text, structure, and history fail to establish that the Government's position is unambiguously correct," the rule of lenity applies and requires that the ambiguity must be resolved in the defendant's favor, *United States v. Granderson*, 511 U.S. 39, 54 (1994); *Simpson v. United States*, 435 U.S. 6, 14 (1978); *Adamo Wrecking Co.*, 434 U.S. at 284-285; *United States v. Bass*, 404 U.S. 336, 347 (1971); *Rewis v. United States*, 401 U.S. 808, 812 (1971). As the Court said in *Ladner v. United States*, "This policy of lenity means that the Court will not interpret a federal criminal statute so as to increase the penalty that it places on an individual when such an interpretation can be based on no more than a guess as to what Congress intended." 358 U.S. 169, 178 (1958).

This "venerable" rule of lenity is rooted in "the instinctive distaste against men languishing in prison unless a lawmaker has clearly said they should." *Bass*, 404 U.S. at 348 (quoting H. Friendly, *Benchmarks* 196, 209 (1967)).[41] The Court has determined that the rule is "founded on two policies that have long been part of our tradition." *Id.* As the Court reiterated in *Bass*:

> First, a fair warning should be given to the world *in language that the common world will understand*, of what the law intends to do if a certain line is passed. To make the warning fair, so far as possible the line should be clear. Second, because of the seriousness of criminal penalties, and because criminal punishment normally represents the moral condemnation of the community, legislatures and not courts should define criminal activity.

Id. (citations and internal quotations omitted) (emphasis added). Justice Frankfurter also explained this policy in *Bell v. United States*,

> When Congress has the will it has no difficulty in expressing it – when it has the will, that is, of defining what it desires to make the unit of prosecution and, more particularly, to make each stick in a faggot a single criminal unit. When Congress leaves to the Judiciary the task of imputing to Congress an undeclared will, the ambiguity should be resolved in favor of lenity. And this not out of any sentimental consideration, or for want of sympathy with the purpose of Congress in proscribing evil or anti-social conduct. It may fairly be said to be a presupposition of our law to resolve doubts in the enforcement of a penal code against the imposition of a harsher punishment.

349 U.S. 81, 83 (1955).

In the present case, the First Circuit did not address the rule of lenity, nor did it explain why its interpretation of the term "carry" was "unambiguously correct." Indeed, the plain meaning of the word, the structure and history of the statute, and the split, acknowledged by the First Circuit, among the courts of appeal make it abundantly clear that the First Circuit's "carrying equals transportation" interpretation is not "unambiguously

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[41] This admonition must apply with particular force in this case, where a prison term is both mandatory and consecutive to the sentence imposed on the predicate drug conviction. *See* discussion *supra* part I.B.4.

correct."[42] Therefore, the rule of lenity requires that the phrase "carries a firearm" must be interpreted in petitioners' favor, as not applying to the presence of firearms located under clothing, in a zipped bag, in the locked trunk of a vehicle in which the petitioners had been riding.

II. SINCE PETITIONERS DID NOT CARRY A FIREARM EITHER "ON THEIR PERSONS" OR "WITHIN EASY REACH" THEIR CONDUCT DID NOT VIOLATE § 924(c).

A. Neither Petitioner Carried A Firearm On His Person.

For all the reasons outlined above *supra* part I, this Court should conclude that "carries a firearm" for the purposes of § 924(c) requires proof that a defendant carried a firearm on his or her person, during and in relation to a predicate offense. Under this standard, petitioners' conduct does not subject them to criminal liability under § 924(c). Petitioners, convicted of attempting to possess cocaine with intent to distribute it, were arrested during, but before the completion of, a drug transaction. Weapons were found in the locked trunk of their car, under some clothes in a zipped bag. The weapons were

[42] The Tenth Circuit acknowledged the "transportation" analysis is not unambiguously correct in *United States v. Miller*, where it noted, "one could interpret this language as meaning that a conviction under the 'carry' prong of 18 U.S.C. § 924(c)(1) cannot stand absent evidence that the defendant physically carried a firearm on his person." 84 F.3d 1244, 1259 (10th Cir.), *cert. denied*, 118 S. Ct. 419 (1997), *overruled on other grounds by United States v. Holland*, 116 F.3d 1353 (10th Cir.), *cert. denied*, 118 S. Ct. 253 (1997).

not on the person of either Gray-Santana or Cleveland. In short, these weapons were not carried in the sense petitioners argue is necessary to find a violation of § 924(c).

B. Petitioners Did Not Have A Weapon "Within Reach" Nor Did They Move With Or Transport An "Immediately Accessible" Weapon.

Even if the Court were to reject the "on the person" definition of carrying firearms, petitioners still prevail under the broader "within reach" or "immediate accessibility" test adopted by the Second, Sixth and Ninth Circuits.[43] Although those circuits take slightly variant

[43] A number of other circuit courts have indicated that they, too, may adopt a requirement of "immediate accessibility" when the case is presented. In *United States v. Moore*, 104 F.3d 377, 380 (D.C. Cir. 1997), the District of Columbia Circuit concluded, albeit without discussion and with the agreement of the government, that evidence of a weapon stowed in the engine compartment of a car was insufficient to sustain a conviction for using or carrying a firearm under § 924(c). This holding suggests that the D.C. Circuit requires some degree of accessibility to make out "carrying a firearm" and may join ranks with the Second, Sixth and Ninth Circuits in requiring that a firearm be "within reach" to be carried. Without deciding the ultimate issue of whether or not a firearm must be immediately accessible to be carried, the Third, Eighth and Eleventh Circuits have only imposed liability for carrying where immediate accessibility was proved. *See, e.g., United States v. Eyer*, 113 F.3d 470, 476 (3rd Cir. 1997) (holding that the facts of that case "compel the conclusion that [the defendant] was carrying the firearm" where he had "easy access to the handgun" while that weapon was being transported); *United States v. Larkin*, 118 F.3d 1253, 1254 (8th Cir.) (reaffirming holding that " 'transporting firearms in the passenger compartment of a car loaded with drugs' constitutes carrying a firearm within the meaning of § 924(c)(1)"), *cert. denied*, 118

approaches to the role movement plays in their definitions of "carrying," the presence of firearms in the trunk of the defendants' car would not support liability under any of these formulations. None of the circuits has adopted the plain meaning of "carries a firearm." However, because the definitions adopted by these circuits require close proximity to the body, they come closer to the on the person meaning of "carrying" than the First Circuit's "transportation" definition does. Any of these definitions is therefore preferable to the "transportation" definition.

The Second Circuit test for "carries a firearm" requires " 'at least a showing that the gun [was] within reach during the commission of the drug offense' in order to sustain a conviction for carrying a firearm [under § 924(c)]." *United States v. Santos*, 84 F.3d 43, 47 (2d Cir.) (citation omitted), *modified*, 95 F.3d 116 (2d Cir. 1996). *See also United States v. Cruz-Rojas*, 101 F.3d 283, 285-86 (2d Cir. 1996); *United States v. Giraldo*, 80 F.3d 667, 676 (2d Cir.), *cert. denied*, 117 S. Ct. 135 (1996).[44] The Second

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S. Ct. 641 (1997); *United States v. Nelson*, 109 F.3d 1323, 1326 (8th Cir. 1997) ("We will assume, without deciding, that ready availability of the firearm is required for a 'carry' conviction in this Circuit."); *United States v. Young*, 1997 WL 786213, *3 (11th Cir. Dec. 23, 1997) (sustaining conviction for carrying a firearm when the weapon was within reach of the defendant).

[44] The Second Circuit has applied its "within reach" test in three cases involving automobiles. In *Cruz-Rojas*, the court held that there was insufficient evidence to support a carrying conviction where a gun was discovered under the dashboard of the vehicle in which two defendants convicted of drug trafficking offenses had been arrested. 101 F.3d at 286 . In *United States v. Pimentel*, the court found ample evidence to support a conviction for "carrying" a firearm, where the gun in question

Circuit's definition of carrying does not require any showing of movement.

The Second Circuit's expansion of the ordinary and natural meaning of "carries a firearm" leads to absurd results.[45] Many items can be "within reach" without being carried. For example, the clock on my desk may be within my reach as I sit at the desk, but one would never, in ordinary parlance, say that I am carrying it.[46] The "within reach" test incorrectly sweeps within the meaning of "carries a firearm" a firearm placed, like my clock, on a desk. However, if the Court adopts the "within reach" construction of carrying a firearm for purposes of § 924(c), petitioners' conduct still falls outside the scope of the statute. The weapons in the locked trunk of Cleveland and Gray-Santana's car were not "within reach" and, therefore, cannot support liability under § 924(c).

The Ninth Circuit agrees that carrying a firearm under § 924(c) requires proof that the firearm is "within

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was found in a compartment located on the back of the front passenger seat, and one of three confederates was seated in the back seat. 83 F.3d 55, 58-59 (2d Cir. 1996). In *Giraldo*, the court found that the evidence was "plainly insufficient" to convict a back seat occupant where "there was no evidence that he could have reached the gun in the cavity beneath the change dish from where he sat." 80 F.3d at 676. In contrast, there was sufficient evidence of "carrying" for a second defendant, where the "gun was within easy reach[.]" *Id.* at 677.

[45] Under this test, the issue invariably arises: how long is my reach? Is Michael Jordan or Kareem-Abdul Jabbar more at risk than Wee Willie Keeler or Tom Thumb?

[46] The discussion in *Bailey* supports the argument that the clock on my desk is not carried. As the Court explained, "a firearm can be used without being carried, *e.g.*, when an offender has a gun on display during a transaction." 116 S. Ct. at 507.

reach."[47] After noting that "carrying a weapon" has a specific dictionary meaning, the Ninth Circuit further observed the necessity under the rules of statutory construction to give "carry" a meaning separate and distinct from "transport." *United States v. Foster*, 1998 WL 2521, at *3 (9th Cir. Jan 5, 1998) (en banc) (noting that this is a "similar danger" to that addressed in *Bailey*, in which a broad reading of "use" would reduce it to a synonym for the term "possess"). A broad reading of "carry," the Ninth Circuit pointed out, would "come[ ] dangerously close to [encompassing mere possession] by prohibiting possession of a gun in a moving vehicle." *Id.* Arguing that such a reading would not reach all possession does not suffice, the Ninth Circuit continued, because "it is not clear why possession in a moving vehicle is any different from possession anywhere else." *Id.* In sum, the Ninth Circuit grounds its "within easy reach" interpretation of "carries a firearm" on its understanding of that phrase,

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[47] In *United States v. Foster*, Judge Kozinski reiterated the Ninth Circuit's test: "in order for a defendant to be convicted of 'carrying' a gun in violation of section 924(c)(1), the defendant must have transported the firearm on or about his or her person. . . . This means the firearm must have been immediately available for use by the defendant." 1998 WL 2521, at *5 (9th Cir. Jan 5, 1998) (en banc) (quoting *United States v. Hernandez*, 80 F.3d 1253, 1258 (9th Cir. 1996)). The Ninth Circuit uses several phrases, seemingly interchangeably, to identify the scope of "carrying"; these phrases include "within easy reach," *id.* at *3, "immediately accessible," *id.* and "on or about the person," *id.* *See also United States v. Staples*, 85 F.3d 461, 464 (9th Cir.) (concluding that a firearm was carried " 'about' [the defendant's] person, within reach and immediately available for use"), *cert. denied*, 117 S. Ct. 318 (1996); *United States v. Willett*, 90 F.3d 404, 407 (9th Cir. 1996) (holding that defendant carried a firearm "within reach and immediately available for use").

and a need to distinguish "carry" from "possess" and "transport." Again, the problem arises as to where to draw the line between "easy reach," "not so easy reach," "it's a stretch," and "beyond reach."

In addition to requiring that a firearm be "within reach," the Ninth Circuit integrates a motion element to carrying. As the majority in *Foster* explained:

> The key aspect of the narrow definition is not that the weapon actually be borne on the person. Rather, it is that the weapon remain within easy reach while the individual is in motion. Where an individual is walking, a gun in hand certainly amounts to carrying, but so does a gun in a holster or a shopping bag. The essence is that the weapon moves with the person and can be swiftly put to use.

Foster, at *2 (footnote omitted). In explaining why "carrying a firearm" covers broader terrain in an automobile context, the Ninth Circuit again focuses on movement, writing:

> Because the car and its contents move in unison, any weapon that is within hand's reach while the car is in motion can be said to be carried. The same would be true, of course, if the individual had the weapon concealed in a train compartment, a bus or, . . . an airplane.

Id. (footnote omitted). Although petitioners contend that motion is not a necessary component of "carrying a firearm" and that "within reach" is an overly inclusive and difficult to apply construction of the phrase, they still

prevail under the Ninth Circuit's test, just as they prevail under the Second Circuit's test.[48]

The Sixth Circuit requires that a firearm be "within reach" or "immediately accessible" to support liability for carrying under § 924(c). *See, e.g., United States v. Washington*, 127 F.3d 510, 514 (6th Cir. 1997).[49] In addition, the Sixth Circuit requires proof of transportation. *Id.* The Sixth Circuit explained its reasons for adopting the "transport and accessibility" test in *United States v. Moore*:

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[48] The Ninth Circuit applied its test to the facts as follows:

> While driving Foster could not reach the gun. To use the gun he would have had to stop the truck, get out, go to the back of the truck, open a snap-down tarp, and unzip the bag containing the gun. . . . If that counts as immediately available, then one could never take a trip with a gun in a vehicle without it being immediately available.

Foster, at *5 (footnote omitted). The firearms in the case at bar were similarly inaccessible.

[49] *See also United States v. Mauldin*, 109 F.3d 1159, 1161 (6th Cir. 1997) (finding liability for carrying where a gun was "within easy reach and immediately available for use"); *United States v. Taylor*, 102 F.3d 767, 769 (6th Cir. 1996), *cert. denied*, 118 S. Ct. 327 (1997); *United States v. Riascos-Suarez*, 73 F.3d 616, 623 (6th Cir. 1995) (requiring a showing of "immediate accessibility" of a firearm to sustain a conviction for carrying a weapon in an automobile), *cert. denied*, 117 S. Ct. 136 (1996). It should be noted that the Sixth Circuit currently has *United States v. Malcuit*, 104 F.3d 880 (6th Cir.), *vacated* 116 F.3d 163 (1997), under en banc review. In *Malcuit*, the court faces two questions: (1) whether a person involved in a drug transaction that was taking place outside his car, carried a firearm that was located inside that car, and (2) whether there was sufficient evidence that the firearm which was present "during" the predicate offense, was also present "in relation to" that offense.

> Although the immediate availability of [a] gun [is] a key factor [in determining whether or not a firearm is carried], we [have not held that] availability [is] the *only* relevant consideration; if Congress had meant section 924(c)(1) to implicate any individual who happens to be within arm's reach of a firearm, surely it would have selected a more accurate term than "carry." A definition of "carry" that takes only availability into account ignores the term's most obvious connotation, *i.e.*, physical transportation.

76 F.3d 111, 113 (6th Cir. 1996) (emphasis in original).[50] This formulation grafts the "within reach" test onto the "transportation" element that other circuits have equated with "carrying."

Although this analysis suffers from the same flaws as does the Ninth Circuit's analysis, petitioners' convictions could not be sustained under the Sixth Circuit test, because the weapons at issue were not immediately accessible. Consequently, petitioners' convictions should be vacated even if the Court determines that "within reach" or "immediate accessibility" is the appropriate test for "carrying." Nothing in the locked trunk was within the immediate reach of either Gray-Santana or Cleveland at any point during the aborted drug transaction. The trunk lid, bag and clothing were interposed between the petitioners and the guns at all times.

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[50] Petitioner's formulation of "carries on the person" avoids the problem identified by the Sixth Circuit, that "within reach" is not an adequate limitation on "carrying." Petitioners' formulation also reaches those cases in which no movement is involved, but only where a weapon is "on the person" and immediately available for use. The Sixth and Ninth Circuit formulations, which require movement or transportation, arguably would not reach these circumstances.

CONCLUSION

For the foregoing reasons, the Court should adopt the ordinary and natural meaning of the phrase "carries a firearm" in construing § 924(c), reverse the First Circuit and vacate petitioners' convictions.

Respectfully submitted,

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UNITED STATES CODE
TITLE 18. CHAPTER 44 – FIREARMS

§ 922. Unlawful acts

(a) It shall be unlawful –

(1) for any person –

(A) except a licensed importer, licensed manufacturer, or licensed dealer, to engage in the business of importing, manufacturing, or dealing in firearms, or in the course of such business to ship, transport, or receive any firearm in interstate or foreign commerce; or

(B) except a licensed importer or licensed manufacturer, to engage in the business of importing or manufacturing ammunition, or in the course of such business, to ship, transport, or receive any ammunition in interstate or foreign commerce;

(2) for any importer, manufacturer, dealer, or collector licensed under the provisions of this chapter to ship or transport in interstate or foreign commerce any firearm to any person other than a licensed importer, licensed manufacturer, licensed dealer, or licensed collector, except that –

(A) this paragraph and subsection (b)(3) shall not be held to preclude a licensed importer, licensed manufacturer, licensed dealer, or licensed collector from returning a firearm or replacement firearm of the same kind and type to a person from whom it was received; and this paragraph shall not be held to preclude an individual from mailing a firearm owned in compliance with Federal, State, and local law to a licensed importer, licensed manufacturer, licensed dealer, or licensed collector;

(B) this paragraph shall not be held to preclude a licensed importer, licensed manufacturer, or licensed dealer from depositing a firearm for conveyance in the mails to any officer, employee, agent, or watchman who, pursuant to the provisions of section 1715 of this title, is eligible to receive through the mails pistols, revolvers, and other firearms capable of being concealed on the person, for use in connection with his official duty; and

(C) nothing in this paragraph shall be construed as applying in any manner in the District of Columbia, the Commonwealth of Puerto Rico, or any possession of the United States differently than it would apply if the District of Columbia, the Commonwealth of Puerto Rico, or the possession were in fact a State of the United States;

(3) for any person, other than a licensed importer, licensed manufacturer, licensed dealer, or licensed collector to transport into or receive in the State where he resides (or if the person is a corporation or other business entity, the State where it maintains a place of business) any firearm purchased or otherwise obtained by such person outside that State, except that this paragraph (A) shall not preclude any person who lawfully acquires a firearm by bequest or intestate succession in a State other than his State of residence from transporting the firearm into or receiving it in that State, if it is lawful for such person to purchase or possess such firearm in that State, (B) shall not apply to the transportation or receipt of a firearm obtained in conformity with subsection (b)(3) of this section, and (C) shall not apply to the transportation of any firearm acquired in any State prior to the effective date of this chapter;

(4) for any person, other than a licensed importer, licensed manufacturer, licensed dealer, or licensed collector, to transport in interstate or foreign commerce any destructive device, machinegun (as defined in section 5845 of the Internal Revenue Code of 1954), short-barreled shotgun, or short-barreled rifle, except as specifically authorized by the Secretary consistent with public safety and necessity;

(5) for any person (other than a licensed importer, licensed manufacturer, licensed dealer, or licensed collector) to transfer, sell, trade, give, transport, or deliver any firearm to any person (other than a licensed importer, licensed manufacturer, licensed dealer, or licensed collector) who the transferor knows or has reasonable cause to believe does not reside in (or if the person is a corporation or other business entity, does not maintain a place of business in) the State in which the transferor resides; except that this paragraph shall not apply to (A) the transfer, transportation, or delivery of a firearm made to carry out a bequest of a firearm to, or an acquisition by intestate succession of a firearm by, a person who is permitted to acquire or possess a firearm under the laws of the State of his residence, and (B) the loan or rental of a firearm to any person for temporary use for lawful sporting purposes;

(6) for any person in connection with the acquisition or attempted acquisition of any firearm or ammunition from a licensed importer, licensed manufacturer, licensed dealer, or licensed collector, knowingly to make any false or fictitious oral or written statement or to furnish or exhibit any false, fictitious, or misrepresented identification, intended or likely to

deceive such importer, manufacturer, dealer, or collector with respect to any fact material to the lawfulness of the sale or other disposition of such firearm or ammunition under the provisions of this chapter;

(7) for any person to manufacture or import armor piercing ammunition, except that this paragraph shall not apply to –

(A) the manufacture or importation of such ammunition for the use of the United States or any department or agency thereof or any State or any department, agency, or political subdivision thereof;

(B) the manufacture of such ammunition for the purpose of exportation; and

(C) any manufacture or importation for the purposes of testing or experimentation authorized by the Secretary;

(8) for any manufacturer or importer to sell or deliver armor piercing ammunition, except that this paragraph shall not apply to –

(A) the sale or delivery by a manufacturer or importer of such ammunition for use of the United States or any department or agency thereof or any State or any department, agency, or political subdivision thereof;

(B) the sale or delivery by a manufacturer or importer of such ammunition for the purpose of exportation;

(C) the sale or delivery by a manufacturer or importer of such ammunition for the purposes of testing or experimenting authorized by the Secretary; and

(9) for any person, other than a licensed importer, licensed manufacturer, licensed dealer, or licensed collector, who does not reside in any State to receive any firearms unless such receipt is for lawful sporting purposes.

(b) It shall be unlawful for any licensed importer, licensed manufacturer, licensed dealer, or licensed collector to sell or deliver –

(1) any firearm or ammunition to any individual who the licensee knows or has reasonable cause to believe is less than eighteen years of age, and, if the firearm, or ammunition is other than a shotgun or rifle, or ammunition for a shotgun or rifle, to any individual who the licensee knows or has reasonable cause to believe is less than twenty-one years of age;

(2) any firearm to any person in any State where the purchase or possession by such person of such firearm would be in violation of any State law or any published ordinance applicable at the place of sale, delivery or other disposition, unless the licensee knows or has reasonable cause to believe that the purchase or possession would not be in violation of such State law or such published ordinance;

(3) any firearm to any person who the licensee knows or has reasonable cause to believe does not reside in (or if the person is a corporation or other business entity, does not maintain a place of business in) the State in which the licensee's place of business is located, except that this paragraph (A) shall not apply to the sale or delivery of any rifle or shotgun to a resident of a State other than a State in which the licensee's place of business is located if the transferee meets in person with the transferor to accomplish the transfer, and the sale, delivery, and receipt fully comply with the legal conditions of sale in both such

States (and any licensed manufacturer, importer or dealer shall be presumed, for purposes of this subparagraph, in the absence of evidence to the contrary, to have had actual knowledge of the State laws and published ordinances of both States), and (B) shall not apply to the loan or rental of a firearm to any person for temporary use for lawful sporting purposes;

(4) to any person any destructive device, machinegun (as defined in section 5845 of the Internal Revenue Code of 1954), short-barreled shotgun, or short-barreled rifle, except as specifically authorized by the Secretary consistent with public safety and necessity; and

(5) any firearm or armor-piercing ammunition to any person unless the licensee notes in his records, required to be kept pursuant to section 923 of this chapter, the name, age, and place of residence of such person if the person is an individual, or the identity and principal and local places of business of such person if the person is a corporation or other business entity.

Paragraphs (1), (2), (3), and (4) of this subsection shall not apply to transactions between licensed importers, licensed manufacturers, licensed dealers, and licensed collectors. Paragraph (4) of this subsection shall not apply to a sale or delivery to any research organization designated by the Secretary.

(c) In any case not otherwise prohibited by this chapter, a licensed importer, licensed manufacturer, or licensed dealer may sell a firearm to a person who does not appear in person at the licensee's business premises (other than another licensed importer, manufacturer, or dealer) only if –

(1) the transferee submits to the transferor a sworn statement in the following form:

"Subject to penalties provided by law, I swear that, in the case of any firearm other than a shotgun or a rifle, I am twenty-one years or more of age, or that, in the case of a shotgun or a rifle, I am eighteen years or more of age; that I am not prohibited by the provisions of chapter 44 of title 18, United States Code, from receiving a firearm in interstate or foreign commerce; and that my receipt of this firearm will not be in violation of any statute of the State and published ordinance applicable to the locality in which I reside. Further, the true title, name, and address of the principal law enforcement officer of the locality to which the firearm will be delivered are. . . .

Signature. . . . Date. . . . ",

and containing blank spaces for the attachment of a true copy of any permit or other information required pursuant to such statute or published ordinance;

(2) the transferor has, prior to the shipment or delivery of the firearm, forwarded by registered or certified mail (return receipt requested) a copy of the sworn statement, together with a description of the firearm, in a form prescribed by the Secretary, to the chief law enforcement officer of the transferee's place of residence, and has received a return receipt evidencing delivery of the statement or has had the statement returned due to the refusal of the named addressee to accept such letter in accordance with United States Post Office Department regulations; and

(3) the transferor has delayed shipment or delivery for a period of at least seven days following receipt of the notification of the acceptance or refusal of delivery of the statement. A copy of the sworn statement and a copy of the notification to the local law enforcement officer, together with evidence of receipt or rejection of that notification shall be retained by the licensee as a part of the records required to be kept under section 923(g).

(d) It shall be unlawful for any person to sell or otherwise dispose of any firearm or ammunition to any person knowing or having reasonable cause to believe that such person –

(1) is under indictment for, or has been convicted in any court of, a crime punishable by imprisonment for a term exceeding one year;

(2) is a fugitive from justice;

(3) is an unlawful user of or addicted to any controlled substance (as defined in section 102 of the Controlled Substances Act (21 U.S.C. 802));

(4) has been adjudicated as a mental defective or has been committed to any mental institution;

(5) who, being an alien, is illegally or unlawfully in the United States;

(6) who has been discharged from the Armed Forces under dishonorable conditions;

(7) who, having been a citizen of the United States, has renounced his citizenship;

(8) is subject to a court order that restrains such person from harassing, stalking, or threatening an intimate partner of such person or child of such

intimate partner or person, or engaging in other conduct that would place an intimate partner in reasonable fear of bodily injury to the partner or child, except that this paragraph shall only apply to a court order that –

(A) was issued after a hearing of which such person received actual notice, and at which such person had the opportunity to participate; and

(B)(i) includes a finding that such person represents a credible threat to the physical safety of such intimate partner or child; or

(ii) by its terms explicitly prohibits the use, attempted use, or threatened use of physical force against such intimate partner or child that would reasonably be expected to cause bodily injury; or

(9) has been convicted in any court of a misdemeanor crime of domestic violence. This subsection shall not apply with respect to the sale or disposition of a firearm or ammunition to a licensed importer, licensed manufacturer, licensed dealer, or licensed collector who pursuant to subsection (b) of section 925 of this chapter is not precluded from dealing in firearms or ammunition, or to a person who has been granted relief from disabilities pursuant to subsection (c) of section 925 of this chapter.

(e) It shall be unlawful for any person knowingly to deliver or cause to be delivered to any common or contract carrier for transportation or shipment in interstate or foreign commerce, to persons other than licensed importers, licensed manufacturers, licensed dealers, or licensed collectors, any package or other container in

which there is any firearm or ammunition without written notice to the carrier that such firearm or ammunition is being transported or shipped; except that any passenger who owns or legally possesses a firearm or ammunition being transported aboard any common or contract carrier for movement with the passenger in interstate or foreign commerce may deliver said firearm or ammunition into the custody of the pilot, captain, conductor or operator of such common or contract carrier for the duration of the trip without violating any of the provisions of this chapter. No common or contract carrier shall require or cause any label, tag, or other written notice to be placed on the outside of any package, luggage, or other container that such package, luggage, or other container contains a firearm.

(f)(1) It shall be unlawful for any common or contract carrier to transport or deliver in interstate or foreign commerce any firearm or ammunition with knowledge or reasonable cause to believe that the shipment, transportation, or receipt thereof would be in violation of the provisions of this chapter.

(2) It shall be unlawful for any common or contract carrier to deliver in interstate or foreign commerce any firearm without obtaining written acknowledgement of receipt from the recipient of the package or other container in which there is a firearm.

(g) It shall be unlawful for any person –

(1) who has been convicted in any court of, a crime punishable by imprisonment for a term exceeding one year;

(2) who is a fugitive from justice;

(3) who is an unlawful user of or addicted to any controlled substance (as defined in section 102 of the Controlled Substances Act (21 U.S.C. 802));

(4) who has been adjudicated as a mental defective or who has been committed to a mental institution;

(5) who, being an alien, is illegally or unlawfully in the United States;

(6) who has been discharged from the Armed Forces under dishonorable conditions;

(7) who, having been a citizen of the United States, has renounced his citizenship;

(8) who is subject to a court order that –

(A) was issued after a hearing of which such person received actual notice, and at which such person had an opportunity to participate;

(B) restrains such person from harassing, stalking, or threatening an intimate partner of such person or child of such intimate partner or person, or engaging in other conduct that would place an intimate partner in reasonable fear of bodily injury to the partner or child; and

(C)(i) includes a finding that such person represents a credible threat to the physical safety of such intimate partner or child; or

(ii) by its terms explicitly prohibits the use, attempted use, or threatened use of physical force against such intimate partner or child that would reasonably be expected to cause bodily injury; or

(9) who has been convicted in any court of a misdemeanor crime of domestic violence, to ship or

transport in interstate or foreign commerce, or possess in or affecting commerce, any firearm or ammunition; or to receive any firearm or ammunition which has been shipped or transported in interstate or foreign commerce.

(h) It shall be unlawful for any individual, who to that individual's knowledge and while being employed for any person described in any paragraph of subsection (g) of this section, in the course of such employment –

(1) to receive, possess, or transport any firearm or ammunition in or affecting interstate or foreign commerce; or

(2) to receive any firearm or ammunition which has been shipped or transported in interstate or foreign commerce.

(i) It shall be unlawful for any person to transport or ship in interstate or foreign commerce, any stolen firearm or stolen ammunition, knowing or having reasonable cause to believe that the firearm or ammunition was stolen.

(j) It shall be unlawful for any person to receive, possess, conceal, store, barter, sell, or dispose of any stolen firearm or stolen ammunition, or pledge or accept as security for a loan any stolen firearm or stolen ammunition, which is moving as, which is a part of, which constitutes, or which has been shipped or transported in, interstate or foreign commerce, either before or after it was stolen, knowing or having reasonable cause to believe that the firearm or ammunition was stolen.

(k) It shall be unlawful for any person knowingly to transport, ship, or receive, in interstate or foreign commerce, any firearm which has had the importer's or manufacturer's serial number removed, obliterated, or altered or to possess or receive any firearm which has had the importer's or manufacturer's serial number removed, obliterated, or altered and has, at any time, been shipped or transported in interstate or foreign commerce.

(l) Except as provided in section 925(d) of this chapter, it shall be unlawful for any person knowingly to import or bring into the United States or any possession thereof any firearm or ammunition; and it shall be unlawful for any person knowingly to receive any firearm or ammunition which has been imported or brought into the United States or any possession thereof in violation of the provisions of this chapter.

(m) It shall be unlawful for any licensed importer, licensed manufacturer, licensed dealer, or licensed collector knowingly to make any false entry in, to fail to make appropriate entry in, or to fail to properly maintain, any record which he is required to keep pursuant to section 923 of this chapter or regulations promulgated thereunder.

(n) It shall be unlawful for any person who is under indictment for a crime punishable by imprisonment for a term exceeding one year to ship or transport in interstate or foreign commerce any firearm or ammunition or receive any firearm or ammunition which has been shipped or transported in interstate or foreign commerce.

(o)(1) Except as provided in paragraph (2), it shall be unlawful for any person to transfer or possess a machine gun.

(2) This subsection does not apply with respect to –

(A) a transfer to or by, or possession by or under the authority of, the United States or any department or agency thereof or a State, or a department, agency, or political subdivision thereof; or

(B) any lawful transfer or lawful possession of a machinegun that was lawfully possessed before the date this subsection takes effect.

(p)(1) It shall be unlawful for any person to manufacture, import, sell, ship, deliver, possess, transfer, or receive any firearm –

(A) that, after removal of grips, stocks, and magazines, is not as detectable as the Security Exemplar, by walk-through metal detectors calibrated and operated to detect the Security Exemplar; or

(B) any major component of which, when subjected to inspection by the types of x-ray machines commonly used at airports, does not generate an image that accurately depicts the shape of the component. Barium sulfate or other compounds may be used in the fabrication of the component.

(2) For purposes of this subsection –

(A) the term "firearm" does not include the frame or receiver of any such weapon;

(B) the term "major component" means, with respect to a firearm, the barrel, the slide or cylinder, or the frame or receiver of the firearm; and

(C) the term "Security Exemplar" means an object, to be fabricated at the direction of the Secretary, that is –

(i) constructed of, during the 12-month period beginning on the date of the enactment of this subsection, 3.7 ounces of material type 17-4 PH stainless steel in a shape resembling a handgun; and

(ii) suitable for testing and calibrating metal detectors: Provided, however, That at the close of such 12-month period, and at appropriate times thereafter the Secretary shall promulgate regulations to permit the manufacture, importation, sale, shipment, delivery, possession, transfer, or receipt of firearms previously prohibited under this subparagraph that are as detectable as a "Security Exemplar" which contains 3.7 ounces of material type 17-4 PH stainless steel, in a shape resembling a handgun, or such lesser amount as is detectable in view of advances in state-of-the-art developments in weapons detection technology.

(3) Under such rules and regulations as the Secretary shall prescribe, this subsection shall not apply to the manufacture, possession, transfer, receipt, shipment, or delivery of a firearm by a licensed manufacturer or any person acting pursuant to a contract with a licensed manufacturer, for the purpose of examining and testing such firearm to determine whether paragraph (1) applies to such firearm. The Secretary shall ensure that rules and regulations

adopted pursuant to this paragraph do not impair the manufacture of prototype firearms or the development of new technology.

(4) The Secretary shall permit the conditional importation of a firearm by a licensed importer or licensed manufacturer, for examination and testing to determine whether or not the unconditional importation of such firearm would violate this subsection.

(5) This subsection shall not apply to any firearm which –

(A) has been certified by the Secretary of Defense or the Director of Central Intelligence, after consultation with the Secretary and the Administrator of the Federal Aviation Administration, as necessary for military or intelligence applications; and

(B) is manufactured for and sold exclusively to military or intelligence agencies of the United States.

(6) This subsection shall not apply with respect to any firearm manufactured in, imported into, or possessed in the United States before the date of the enactment of the Undetectable Firearms Act of 1988.

(q)(1) The Congress finds and declares that –

(A) crime, particularly crime involving drugs and guns, is a pervasive, nationwide problem;

(B) crime at the local level is exacerbated by the interstate movement of drugs, guns, and criminal gangs;

(C) firearms and ammunition move easily in interstate commerce and have been found in increasing numbers in and around schools, as

documented in numerous hearings in both the Committee on the Judiciary the House of Representatives and the Committee on the Judiciary of the Senate;

(D) in fact, even before the sale of a firearm, the gun, its component parts, ammunition, and the raw materials from which they are made have considerably moved in interstate commerce;

(E) while criminals freely move from State to State, ordinary citizens and foreign visitors may fear to travel to or through certain parts of the country due to concern about violent crime and gun violence, and parents may decline to send their children to school for the same reason;

(F) the occurrence of violent crime in school zones has resulted in a decline in the quality of education in our country;

(G) this decline in the quality of education has an adverse impact on interstate commerce and the foreign commerce of the United States;

(H) States, localities, and school systems find it almost impossible to handle gun-related crime by themselves – even States, localities, and school systems that have made strong efforts to prevent, detect, and punish gun-related crime find their efforts unavailing due in part to the failure or inability of other States or localities to take strong measures; and

(I) the Congress has the power, under the interstate commerce clause and other provisions of the Constitution, to enact measures to ensure the integrity and safety of the Nation's schools by enactment of this subsection.

(2)(A) It shall be unlawful for any individual knowingly to possess a firearm that has moved in or that otherwise affects interstate or foreign commerce at a place that the individual knows, or has reasonable cause to believe, is a school zone.

(B) Subparagraph (A) does not apply to the possession of a firearm –

(i) on private property not part of school grounds;

(ii) if the individual possessing the firearm is licensed to do so by the State in which the school zone is located or a political subdivision of the State, and the law of the State or political subdivision requires that, before an individual obtains such a license, the law enforcement authorities of the State or political subdivision verify that the individual is qualified under law to receive the license;

(iii) that is –

(I) not loaded; and

(II) in a locked container, or a locked firearms rack that is on a motor vehicle;

(iv) by an individual for use in a program approved by a school in the school zone;

(v) by an individual in accordance with a contract entered into between a school in the school zone and the individual or an employer of the individual;

(vi) by a law enforcement officer acting in his or her official capacity; or

(vii) that is unloaded and is possessed by an individual while traversing school

premises for the purpose of gaining access to public or private lands open to hunting, if the entry on school premises is authorized by school authorities.

(3)(A) Except as provided in subparagraph (B), it shall be unlawful for any person, knowingly or with reckless disregard for the safety of another, to discharge or attempt to discharge a firearm that has moved in or that otherwise affects interstate or foreign commerce at a place that the person knows is a school zone.

(B) Subparagraph (A) does not apply to the discharge of a firearm –

(i) on private property not part of school grounds;

(ii) as part of a program approved by a school in the school zone, by an individual who is participating in the program;

(iii) by an individual in accordance with a contract entered into between a school in a school zone and the individual or an employer of the individual; or

(iv) by a law enforcement officer acting in his or her official capacity.

(4) Nothing in this subsection shall be construed as preempting or preventing a State or local government from enacting a statute establishing gun free school zones as provided in this subsection.

(r) It shall be unlawful for any person to assemble from imported parts any semiautomatic rifle or any shotgun which is identical to any rifle or shotgun prohibited from importation under section 925(d)(3) of this chapter as not being particularly suitable for or readily adaptable

to sporting purposes except that this subsection shall not apply to –

(1) the assembly of any such rifle or shotgun for sale or distribution by a licensed manufacturer to the United States or any department or agency thereof or to any State or any department, agency, or political subdivision thereof; or

(2) the assembly of any such rifle or shotgun for the purposes of testing or experimentation authorized by the Secretary.

(s)(1) Beginning on the date that is 90 days after the date of enactment of this subsection and ending on the day before the date that is 60 months after such date of enactment, it shall be unlawful for any licensed importer, licensed manufacturer, or licensed dealer to sell, deliver, or transfer a handgun (other than the return of a handgun to the person from whom it was received) to an individual who is not licensed under section 923, unless –

(A) after the most recent proposal of such transfer by the transferee –

(i) the transferor has –

(I) received from the transferee a statement of the transferee containing the information described in paragraph (3);

(II) verified the identity of the transferee by examining the identification document presented;

(III) within 1 day after the transferee furnishes the statement, provided notice of the contents of the statement to the chief law enforcement officer of the place of residence of the transferee; and

(IV) within 1 day after the transferee furnishes the statement, transmitted a copy of the statement to the chief law enforcement officer of the place of residence of the transferee; and

(ii)(I) 5 business days (meaning days on which State offices are open) have elapsed from the date the transferor furnished notice of the contents of the statement to the chief law enforcement officer, during which period the transferor has not received information from the chief law enforcement officer that receipt or possession of the handgun by the transferee would be in violation of Federal, State, or local law; or

(II) the transferor has received notice from the chief law enforcement officer that the officer has no information indicating that receipt or possession of the handgun by the transferee would violate Federal, State, or local law;

(B) the transferee has presented to the transferor a written statement, issued by the chief law enforcement officer of the place of residence of the transferee during the 10-day period ending on the date of the most recent proposal of such transfer by the transferee, stating that the transferee requires access to a handgun because of a threat to the life of the transferee or of any member of the household of the transferee;

(C)(i) the transferee has presented to the transferor a permit that –

(I) allows the transferee to possess or acquire a handgun; and

(II) was issued not more than 5 years earlier by the State in which the transfer is to take place; and

(ii) the law of the State provides that such a permit is to be issued only after an authorized government official has verified that the information available to such official does not indicate that possession of a handgun by the transferee would be in violation of the law;

(D) the law of the State requires that, before any licensed importer, licensed manufacturer, or licensed dealer completes the transfer of a handgun to an individual who is not licensed under section 923, an authorized government official verify that the information available to such official does not indicate that possession of a handgun by the transferee would be in violation of law;

(E) the Secretary has approved the transfer under section 5812 of the Internal Revenue Code of 1986; or

(F) on application of the transferor, the Secretary has certified that compliance with subparagraph (A)(i)(III) is impracticable because –

(i) the ratio of the number of law enforcement officers of the State in which the transfer is to occur to the number of square miles of land area of the State does not exceed 0.0025;

(ii) the business premises of the transferor at which the transfer is to occur are

extremely remote in relation to the chief law enforcement officer; and

(iii) there is an absence of telecommunications facilities in the geographical area in which the business premises are located.

(2) A chief law enforcement officer to whom a transferor has provided notice pursuant to paragraph (1)(A)(i)(III) shall make a reasonable effort to ascertain within 5 business days whether receipt or possession would be in violation of the law, including research in whatever State and local recordkeeping systems are available and in a national system designated by the Attorney General.

(3) The statement referred to in paragraph (1)(A)(i)(I) shall contain only –

(A) the name, address, and date of birth appearing on a valid identification document (as defined in section 1028(d)(1)) of the transferee containing a photograph of the transferee and a description of the identification used;

(B) a statement that the transferee –

(i) is not under indictment for, and has not been convicted in any court of, a crime punishable by imprisonment for a term exceeding 1 year, and has not been convicted in any court of a misdemeanor crime of domestic violence;

(ii) is not a fugitive from justice;

(iii) is not an unlawful user of or addicted to any controlled substance (as defined in section 102 of the Controlled Substances Act);

(iv) has not been adjudicated as a mental defective or been committed to a mental institution;

(v) is not an alien who is illegally or unlawfully in the United States;

(vi) has not been discharged from the Armed Forces under dishonorable conditions; and

(vii) is not a person who, having been a citizen of the United States, has renounced such citizenship;

(C) the date the statement is made; and

(D) notice that the transferee intends to obtain a handgun from the transferor.

(4) Any transferor of a handgun who, after such transfer, receives a report from a chief law enforcement officer containing information that receipt or possession of the handgun by the transferee violates Federal, State, or local law shall, within 1 business day after receipt of such request, communicate any information related to the transfer that the transferor has about the transfer and the transferee to –

(A) the chief law enforcement officer of the place of business of the transferor; and

(B) the chief law enforcement officer of the place of residence of the transferee.

(5) Any transferor who receives information, not otherwise available to the public, in a report under this subsection shall not disclose such information except to the transferee, to law enforcement authorities, or pursuant to the direction of a court of law.

(6)(A) Any transferor who sells, delivers, or otherwise transfers a handgun to a transferee shall retain the copy of the statement of the transferee with respect to the handgun transaction, and shall retain evidence that the transferor has complied with subclauses (III) and (IV) of paragraph (1)(A)(i) with respect to the statement.

(B) Unless the chief law enforcement officer to whom a statement is transmitted under paragraph (1)(A)(i)(IV) determines that a transaction would violate Federal, State, or local law –

(i) the officer shall, within 20 business days after the date the transferee made the statement on the basis of which the notice was provided, destroy the statement, any record containing information derived from the statement, and any record created as a result of the notice required by paragraph (1)(A)(i)(III);

(ii) the information contained in the statement shall not be conveyed to any person except a person who has a need to know in order to carry out this subsection; and

(iii) the information contained in the statement shall not be used for any purpose other than to carry out this subsection.

(C) If a chief law enforcement officer determines that an individual is ineligible to receive a handgun and the individual requests the officer to provide the reason for such determination, the officer shall provide such reasons to the individual in writing within 20 business days after receipt of the request.

(7) A chief law enforcement officer or other person responsible for providing criminal history background information pursuant to this subsection shall not be liable in an action at law for damages –

(A) for failure to prevent the sale or transfer of a handgun to a person whose receipt or possession of the handgun is unlawful under this section; or

(B) for preventing such a sale or transfer to a person who may lawfully receive or possess a handgun.

(8) For purposes of this subsection, the term "chief law enforcement officer" means the chief of police, the sheriff, or an equivalent officer or the designee of any such individual.

(9) The Secretary shall take necessary actions to ensure that the provisions of this subsection are published and disseminated to licensed dealers, law enforcement officials, and the public.

(t)(1) Beginning on the date that is 30 days after the Attorney General notifies licensees under section 103(d) of the Brady Handgun Violence Prevention Act that the national instant criminal background check system is established, a licensed importer, licensed manufacturer, or licensed dealer shall not transfer a firearm to any other person who is not licensed under this chapter, unless –

(A) before the completion of the transfer, the licensee contacts the national instant criminal background check system established under section 103 of that Act;

(B)(i) the system provides the licensee with a unique identification number; or

(ii) 3 business days (meaning a day on which State offices are open) have elapsed since the licensee contacted the system, and the system has not notified the licensee that the receipt of a firearm by such other person would violate subsection (g) or (n) of this section; and

(C) the transferor has verified the identity of the transferee by examining a valid identification document (as defined in section 1028(d)(1) of this title) of the transferee containing a photograph of the transferee.

(2) If receipt of a firearm would not violate subsection (g) or (n) or State law, the system shall –

(A) assign a unique identification number to the transfer;

(B) provide the licensee with the number; and

(C) destroy all records of the system with respect to the call (other than the identifying number and the date the number was assigned) and all records of the system relating to the person or the transfer.

(3) Paragraph (1) shall not apply to a firearm transfer between a licensee and another person if –

(A)(i) such other person has presented to the licensee a permit that –

(I) allows such other person to possess or acquire a firearm; and

(II) was issued not more than 5 years earlier by the State in which the transfer is to take place; and

(ii) the law of the State provides that such a permit is to be issued only after an authorized government official has verified that the information available to such official does not indicate that possession of a firearm by such other person would be in violation of law;

(B) the Secretary has approved the transfer under section 5812 of the Internal Revenue Code of 1986; or

(C) on application of the transferor, the Secretary has certified that compliance with paragraph (1)(A) is impracticable because –

(i) the ratio of the number of law enforcement officers of the State in which the transfer is to occur to the number of square miles of land area of the State does not exceed 0.0025;

(ii) the business premises of the licensee at which the transfer is to occur are extremely remote in relation to the chief law enforcement officer (as defined in subsection (s)(8)); and

(iii) there is an absence of telecommunications facilities in the geographical area in which the business premises are located.

(4) If the national instant criminal background check system notifies the licensee that the information available to the system does not demonstrate that the receipt of a firearm by such other person would violate subsection (g) or (n) or State law, and the licensee transfers a firearm to such other person, the licensee shall include in the record of the transfer the unique identification number provided by the system with respect to the transfer.

(5) If the licensee knowingly transfers a firearm to such other person and knowingly fails to comply with paragraph (1) of this subsection with respect to the transfer and, at the time such other person most recently proposed the transfer, the national instant criminal background check system was operating and information was available to the system demonstrating that receipt of a firearm by such other person would violate subsection (g) or (n) of this section or State law, the Secretary may, after notice and opportunity for a hearing, suspend for not more than 6 months or revoke any license issued to the licensee under section 923, and may impose on the licensee a civil fine of not more than $5,000.

(6) Neither a local government nor an employee of the Federal Government or of any State or local government, responsible for providing information to the national instant criminal background check system shall be liable in an action at law for damages –

(A) for failure to prevent the sale or transfer of a firearm to a person whose receipt or possession of the firearm is unlawful under this section; or

(B) for preventing such a sale or transfer to a person who may lawfully receive or possess a firearm.

(u) It shall be unlawful for a person to steal or unlawfully take or carry away from the person or the premises of a person who is licensed to engage in the business of importing, manufacturing, or dealing in firearms, any firearm in the licensee's business inventory that has been shipped or transported in interstate or foreign commerce.

(v)(1) It shall be unlawful for a person to manufacture, transfer, or possess a semiautomatic assault weapon.

(2) Paragraph (1) shall not apply to the possession or transfer of any semiautomatic assault weapon otherwise lawfully possessed under Federal law on the date of the enactment of this subsection.

(3) Paragraph (1) shall not apply to –

(A) any of the firearms, or replicas or duplicates of the firearms, specified in Appendix A to this section, as such firearms were manufactured on October 1, 1993;

(B) any firearm that –

(i) is manually operated by bolt, pump, lever, or slide action;

(ii) has been rendered permanently inoperable; or

(iii) is an antique firearm;

(C) any semiautomatic rifle that cannot accept a detachable magazine that holds more than 5 rounds of ammunition; or

(D) any semiautomatic shotgun that cannot hold more than 5 rounds of ammunition in a fixed or detachable magazine. The fact that a firearm is not listed in Appendix A shall not be construed to mean that paragraph (1) applies to such firearm. No firearm exempted by this subsection may be deleted from Appendix A so long as this subsection is in effect.

(4) Paragraph (1) shall not apply to –

(A) the manufacture for, transfer to, or possession by the United States or a department

or agency of the United States or a State or a department, agency, or political subdivision of a State, or a transfer to or possession by a law enforcement officer employed by such an entity for purposes of law enforcement (whether on or off duty);

(B) the transfer to a licensee under title I of the Atomic Energy Act of 1954 for purposes of establishing and maintaining an on-site physical protection system and security organization required by Federal law, or possession by an employee or contractor of such licensee on-site for such purposes or off-site for purposes of licensee-authorized training or transportation of nuclear materials;

(C) the possession, by an individual who is retired from service with a law enforcement agency and is not otherwise prohibited from receiving a firearm, of a semiautomatic assault weapon transferred to the individual by the agency upon such retirement; or

(D) the manufacture, transfer, or possession of a semiautomatic assault weapon by a licensed manufacturer or licensed importer for the purposes of testing or experimentation authorized by the Secretary.

(w)(1) Except as provided in paragraph (2), it shall be unlawful for a person to transfer or possess a large capacity ammunition feeding device.

(2) Paragraph (1) shall not apply to the possession or transfer of any large capacity ammunition feeding device otherwise lawfully possessed on or before the date of the enactment of this subsection.

(3) This subsection shall not apply to –

(A) the manufacture for, transfer to, or possession by the United States or a department or agency of the United States or a State or a department, agency, or political subdivision of a State, or a transfer to or possession by a law enforcement officer employed by such an entity for purposes of law enforcement (whether on or off duty);

(B) the transfer to a licensee under title I of the Atomic Energy Act of 1954 for purposes of establishing and maintaining an on-site physical protection system and security organization required by Federal law, or possession by an employee or contractor of such licensee on-site for such purposes or off-site for purposes of licensee-authorized training or transportation of nuclear materials;

(C) the possession, by an individual who is retired from service with a law enforcement agency and is not otherwise prohibited from receiving ammunition, of a large capacity ammunition feeding device transferred to the individual by the agency upon such retirement; or

(D) the manufacture, transfer, or possession of any large capacity ammunition feeding device by a licensed manufacturer or licensed importer for the purposes of testing or experimentation authorized by the Secretary.

(4) If a person charged with violating paragraph (1) asserts that paragraph (1) does not apply to such person because of paragraph (2) or (3), the Government shall have the burden of proof to show that such paragraph (1) applies to such person. The lack of a serial number as described in section 923(i) of this title shall be a presumption that the large

capacity ammunition feeding device is not subject to the prohibition of possession in paragraph (1).

(x)(1) It shall be unlawful for a person to sell, deliver, or otherwise transfer to a person who the transferor knows or has reasonable cause to believe is a juvenile –

(A) a handgun; or

(B) ammunition that is suitable for use only in a handgun.

(2) It shall be unlawful for any person who is a juvenile to knowingly possess –

(A) a handgun; or

(B) ammunition that is suitable for use only in a handgun.

(3) This subsection does not apply to –

(A) a temporary transfer of a handgun or ammunition to a juvenile or to the possession or use of a handgun or ammunition by a juvenile if the handgun and ammunition are possessed and used by the juvenile –

(i) in the course of employment, in the course of ranching or farming related to activities at the residence of the juvenile (or on property used for ranching or farming at which the juvenile, with the permission of the property owner or lessee, is performing activities related to the operation of the farm or ranch), target practice, hunting, or a course of instruction in the safe and lawful use of a handgun;

(ii) with the prior written consent of the juvenile's parent or guardian who is not

prohibited by Federal, State, or local law from possessing a firearm, except –

(I) during transportation by the juvenile of an unloaded handgun in a locked container directly from the place of transfer to a place at which an activity described in clause (i) is to take place and transportation by the juvenile of that handgun, unloaded and in a locked container, directly from the place at which such an activity took place to the transferor; or

(II) with respect to ranching or farming activities as described in clause (i), a juvenile may possess and use a handgun or ammunition with the prior written approval of the juvenile's parent or legal guardian and at the direction of an adult who is not prohibited by Federal, State or local law from possessing a firearm;

(iii) the juvenile has the prior written consent in the juvenile's possession at all times when a handgun is in the possession of the juvenile; and

(iv) in accordance with State and local law;

(B) a juvenile who is a member of the Armed Forces of the United States or the National Guard who possesses or is armed with a handgun in the line of duty;

(C) a transfer by inheritance of title (but not possession) of a handgun or ammunition to a juvenile; or

(D) the possession of a handgun or ammunition by a juvenile taken in defense of the juvenile or other persons against an intruder into the residence of the juvenile or a residence in which the juvenile is an invited guest.

(4) A handgun or ammunition, the possession of which is transferred to a juvenile in circumstances in which the transferor is not in violation of this subsection shall not be subject to permanent confiscation by the Government if its possession by the juvenile subsequently becomes unlawful because of the conduct of the juvenile, but shall be returned to the lawful owner when such handgun or ammunition is no longer required by the Government for the purposes of investigation or prosecution.

(5) For purposes of this subsection, the term "juvenile" means a person who is less than 18 years of age.

(6)(A) In a prosecution of a violation of this subsection, the court shall require the presence of a juvenile defendant's parent or legal guardian at all proceedings.

(B) The court may use the contempt power to enforce subparagraph (A).

(C) The court may excuse attendance of a parent or legal guardian of a juvenile defendant at a proceeding in a prosecution of a violation of this subsection for good cause shown.

§ 924. Penalties

(a)(1) Except as otherwise provided in this subsection, subsection (b), (c), or (f) of this section, or in section 929, whoever –

(A) knowingly makes any false statement or representation with respect to the information required by this chapter to be kept in the records of a person licensed under this chapter or in applying for any license or exemption or relief from disability under the provisions of this chapter;

(B) knowingly violates subsection (a)(4), (f), (k), (r), (v), or (w) of section 922;

(C) knowingly imports or brings into the United States or any possession thereof any firearm or ammunition in violation of section 922(l); or

(D) willfully violates any other provision of this chapter,

shall be fined under this title, imprisoned not more than five years, or both.

(2) Whoever knowingly violates subsection (a)(6), (d), (g), (h), (i), (j), or (o) of section 922 shall be fined as provided in this title, imprisoned not more than 10 years, or both.

(3) Any licensed dealer, licensed importer, licensed manufacturer, or licensed collector who knowingly –

(A) makes any false statement or representation with respect to the information required by the provisions of this chapter to be kept in the records of a person licensed under this chapter, or

(B) violates subsection (m) of section 922, shall be fined under this title, imprisoned not more than one year, or both.

(4) Whoever violates section 922(q) shall be fined under this title, imprisoned for not more than 5 years, or both. Notwithstanding any other provision of law, the term of imprisonment imposed under this paragraph shall not run concurrently with any other term of imprisonment imposed under any other provision of law. Except for the authorization of a term of imprisonment of not more than 5 years made in this paragraph, for the purpose of any other law a violation of section 922(q) shall be deemed to be a misdemeanor.

(5) Whoever knowingly violates subsection (s) or (t) of section 922 shall be fined under this title, imprisoned for not more than 1 year, or both.

(6)(A)(i) A juvenile who violates section 922(x) shall be fined under this title, imprisoned not more than 1 year, or both, except that a juvenile described in clause (ii) shall be sentenced to probation on appropriate conditions and shall not be incarcerated unless the juvenile fails to comply with a condition of probation.

(ii) A juvenile is described in this clause if –

(I) the offense of which the juvenile is charged is possession of a handgun or ammunition in violation of section 922(x)(2); and

(II) the juvenile has not been convicted in any court of an offense (including an offense under section 922(x) or a similar State law, but not including any other offense consisting of conduct that if

engaged in by an adult would not constitute an offense) or adjudicated as a juvenile delinquent for conduct that if engaged in by an adult would constitute an offense.

(B) A person other than a juvenile who knowingly violates section 922(x) –

(i) shall be fined under this title, imprisoned not more than 1 year, or both; and

(ii) if the person sold, delivered, or otherwise transferred a handgun or ammunition to a juvenile knowing or having reasonable cause to know that the juvenile intended to carry or otherwise possess or discharge or otherwise use the handgun or ammunition in the commission of a crime of violence, shall be fined under this title, imprisoned not more than 10 years, or both.

(b) Whoever, with intent to commit therewith an offense punishable by imprisonment for a term exceeding one year, or with knowledge or reasonable cause to believe that an offense punishable by imprisonment for a term exceeding one year is to be committed therewith, ships, transports, or receives a firearm or any ammunition in interstate or foreign commerce shall be fined under this title, or imprisoned not more than ten years, or both.

(c)(1) Whoever, during and in relation to any crime of violence or drug trafficking crime (including a crime of violence or drug trafficking crime which provides for an enhanced punishment if committed by the use of a deadly or dangerous weapon or device) for which he may be prosecuted in a court of

the United States, uses or carries a firearm, shall, in addition to the punishment provided for such crime of violence or drug trafficking crime, be sentenced to imprisonment for five years, and if the firearm is a short-barreled rifle, short-barreled shotgun, or semi-automatic assault weapon, to imprisonment for ten years, and if the firearm is a machine gun, or a destructive device, or is equipped with a firearm silencer or firearm muffler, to imprisonment for thirty years. In the case of his second or subsequent conviction under this subsection, such person shall be sentenced to imprisonment for twenty years, and if the firearm is a machine gun, or a destructive device, or is equipped with a firearm silencer or firearm muffler, to life imprisonment without release. Notwithstanding any other provision of law, the court shall not place on probation or suspend the sentence of any person convicted of a violation of this subsection, nor shall the term of imprisonment imposed under this subsection run concurrently with any other term of imprisonment including that imposed for the crime of violence or drug trafficking crime in which the firearm was used or carried.

(2) For purposes of this subsection, the term "drug trafficking crime" means any felony punishable under the Controlled Substances Act (21 U.S.C. 801 et seq.), the Controlled Substances Import and Export Act (21 U.S.C. 951 et seq.), or the Maritime Drug Law Enforcement Act (46 U.S.C. App. 1901 et seq.).

(3) For purposes of this subsection the term "crime of violence" means an offense that is a felony and –

(A) has as an element the use, attempted use, or threatened use of physical force against the person or property of another, or

(B) that by its nature, involves a substantial risk that physical force against the person or property of another may be used in the course of committing the offense.

(d)(1) Any firearm or ammunition involved in or used in any knowing violation of subsection (a)(4), (a)(6), (f), (g), (h), (i), (j), or (k) of section 922, or knowing importation or bringing into the United States or any possession thereof any firearm or ammunition in violation of section 922(l), or knowing violation of section 924, or willful violation of any other provision of this chapter or any rule or regulation promulgated thereunder, or any violation of any other criminal law of the United States, or any firearm or ammunition intended to be used in any offense referred to in paragraph (3) of this subsection, where such intent is demonstrated by clear and convincing evidence, shall be subject to seizure and forfeiture, and all provisions of the Internal Revenue Code of 1954 relating to the seizure, forfeiture, and disposition of firearms, as defined in section 5845(a) of that Code, shall, so far as applicable, extend to seizures and forfeitures under the provisions of this chapter: Provided, That upon acquittal of the owner or possessor, or dismissal of the charges against him other than upon motion of the Government prior to trial, or lapse of or court termination of the restraining order to which he is subject, the seized or relinquished firearms or ammunition shall be returned forthwith to the owner or possessor or to a person delegated by the owner or possessor unless the return of the firearms or ammunition would place the owner or possessor or his delegate in violation of law. Any action or proceeding for the forfeiture of firearms or ammunition shall be commenced within one hundred and twenty days of such seizure.

(2)(A) In any action or proceeding for the return of firearms or ammunition seized under the provisions of this chapter, the court shall allow the prevailing party, other than the United States, a reasonable attorney's fee, and the United States shall be liable therefor.

(B) In any other action or proceeding under the provisions of this chapter, the court, when it finds that such action was without foundation, or was initiated vexatiously, frivolously, or in bad faith, shall allow the prevailing party, other than the United States, a reasonable attorney's fee, and the United States shall be liable therefor.

(C) Only those firearms or quantities of ammunition particularly named and individually identified as involved in or used in any violation of the provisions of this chapter or any rule or regulation issued thereunder, or any other criminal law of the United States or as intended to be used in any offense referred to in paragraph (3) of this subsection, where such intent is demonstrated by clear and convincing evidence, shall be subject to seizure, forfeiture, and disposition.

(D) The United States shall be liable for attorneys' fees under this paragraph only to the extent provided in advance by appropriation Acts.

(3) The offenses referred to in paragraphs (1) and (2)(C) of this subsection are –

(A) any crime of violence, as that term is defined in section 924(c)(3) of this title;

(B) any offense punishable under the Controlled Substances Act (21 U.S.C. 801 et seq.) or

the Controlled Substances Import and Export Act (21 U.S.C. 951 et seq.);

(C) any offense described in section 922(a)(1), 922(a)(3), 922(a)(5), or 922(b)(3) of this title, where the firearm or ammunition intended to be used in any such offense is involved in a pattern of activities which includes a violation of any offense described in section 922(a)(1), 922(a)(3), 922(a)(5), or 922(b)(3) of this title;

(D) any offense described in section 922(d) of this title where the firearm or ammunition is intended to be used in such offense by the transferor of such firearm or ammunition;

(E) any offense described in section 922(i), 922(j), 922(l), 922(n), or 924(b) of this title; and

(F) any offense which may be prosecuted in a court of the United States which involves the exportation of firearms or ammunition.

(e)(1) In the case of a person who violates section 922(g) of this title and has three previous convictions by any court referred to in section 922(g)(1) of this title for a violent felony or a serious drug offense, or both, committed on occasions different from one another, such person shall be fined not more than $25,000 and imprisoned not less than fifteen years, and, notwithstanding any other provision of law, the court shall not suspend the sentence of, or grant a probationary sentence to, such person with respect to the conviction under section 922(g).

(2) As used in this subsection –

(A) the term "serious drug offense" means –

(i) an offense under the Controlled Substances Act (21 U.S.C. 801 et seq.), the

Controlled Substances Import and Export Act (21 U.S.C. 951 et seq.), or the Maritime Drug Law Enforcement Act (46 U.S.C. App. 1901 et seq.), for which a maximum term of imprisonment of ten years or more is prescribed by law; or

(ii) an offense under State law, involving manufacturing, distributing, or possessing with intent to manufacture or distribute, a controlled substance (as defined in section 102 of the Controlled Substances Act (21 U.S.C. 802)), for which a maximum term of imprisonment of ten years or more is prescribed by law;

(B) the term "violent felony" means any crime punishable by imprisonment for a term exceeding one year, or any act of juvenile delinquency involving the use or carrying of a firearm, knife, or destructive device that would be punishable by imprisonment for such term if committed by an adult, that –

(i) has as an element the use, attempted use, or threatened use of physical force against the person of another; or

(ii) is burglary, arson, or extortion, involves use of explosives, or otherwise involves conduct that presents a serious potential risk of physical injury to another; and

(C) the term "conviction" includes a finding that a person has committed an act of juvenile delinquency involving a violent felony.

(f) In the case of a person who knowingly violates section 922(p), such person shall be fined under this title, or imprisoned not more than 5 years, or both.

(g) Whoever, with the intent to engage in conduct which –

(1) constitutes an offense listed in section 1961(1),

(2) is punishable under the Controlled Substances Act (21 U.S.C. 802 et seq.), the Controlled Substances Import and Export Act (21 U.S.C. 951 et seq.), or the Maritime Drug Law Enforcement Act (46 U.S.C. App. 1901 et seq.),

(3) violates any State law relating to any controlled substance (as defined in section 102(6) of the Controlled Substances Act (21 U.S.C. 802(6))), or

(4) constitutes a crime of violence (as defined in subsection (c)(3)), travels from any State or foreign country into any other State and acquires, transfers, or attempts to acquire or transfer, a firearm in such other State in furtherance of such purpose, shall be imprisoned not more than 10 years, fined in accordance with this title, or both.

(h) Whoever knowingly transfers a firearm, knowing that such firearm will be used to commit a crime of violence (as defined in subsection (c)(3)) or drug trafficking crime (as defined in subsection (c)(2)) shall be imprisoned not more than 10 years, fined in accordance with this title, or both.

(i)(1) A person who knowingly violates section 922(u) shall be fined under this title, imprisoned not more than 10 years, or both.

(2) Nothing contained in this subsection shall be construed as indicating an intent on the part of Congress to occupy the field in which provisions of this subsection operate to the exclusion of State laws on the same subject matter, nor shall any provision of this subsection be construed as invalidating any provision of State law unless such provision is inconsistent with any of the purposes of this subsection.

(j) A person who, in the course of a violation of subsection (c), causes the death of a person through the use of a firearm, shall –

(1) if the killing is a murder (as defined in section 1111), be punished by death or by imprisonment for any term of years or for life; and

(2) if the killing is manslaughter (as defined in section 1112), be punished as provided in that section.

(k) A person who, with intent to engage in or to promote conduct that –

(1) is punishable under the Controlled Substances Act (21 U.S.C. 801 et seq.), the Controlled Substances Import and Export Act (21 U.S.C. 951 et seq.), or the Maritime Drug Law Enforcement Act (46 U.S.C. App. 1901 et seq.);

(2) violates any law of a State relating to any controlled substance (as defined in section 102 of the Controlled Substances Act, 21 U.S.C. 802); or

(3) constitutes a crime of violence (as defined in subsection (c)(3)), smuggles or knowingly brings into the United States a firearm, or attempts to do so, shall be imprisoned not more than 10 years, fined under this title, or both.

(l) A person who steals any firearm which is moving as, or is a part of, or which has moved in, interstate or foreign commerce shall be imprisoned for not more than 10 years, fined under this title, or both.

(m) A person who steals any firearm from a licensed importer, licensed manufacturer, licensed dealer, or licensed collector shall be fined under this title, imprisoned not more than 10 years, or both.

(n) A person who, with the intent to engage in conduct that constitutes a violation of section 922(a)(1)(A), travels from any State or foreign country into any other State and acquires, or attempts to acquire, a firearm in such other State in furtherance of such purpose shall be imprisoned for not more than 10 years.

(o) A person who conspires to commit an offense under subsection (c) shall be imprisoned for not more than 20 years, fined under this title, or both; and if the firearm is a machinegun or destructive device, or is equipped with a firearm silencer or muffler, shall be imprisoned for any term of years or life.

§ 925. Exceptions: Relief from disabilities

(a)(1) The provisions of this chapter, except for sections 922(d)(9) and 922(g)(9) and provisions relating to firearms subject to the prohibitions of section 922(p), shall not apply with respect to the transportation, shipment, receipt, possession, or importation of any firearm or ammunition imported for, sold or shipped to, or issued for the use of, the United States or any department or agency thereof or any State or any department, agency, or political subdivision thereof.

(2) The provisions of this chapter shall not apply with respect to (A) the shipment or receipt of firearms or ammunition when sold or issued by the Secretary of the Army pursuant to section 4308 of title 10, before the repeal of such section by section 1624(a) of the Corporation for the Promotion of Rifle Practice and Firearms Safety Act, and (B) the transportation of any such firearm or ammunition carried out to enable a person, who lawfully received such firearm or ammunition from the Secretary of the Army, to engage in military training or in competitions.

(3) Unless otherwise prohibited by this chapter or any other Federal law, a licensed importer, licensed manufacturer, or licensed dealer may ship to a member of the United States Armed Forces on active duty outside the United States or to clubs, recognized by the Department of Defense, whose entire membership is composed of such members, and such members or clubs may receive a firearm or ammunition determined by the Secretary of the Treasury to be generally recognized as particularly suitable for sporting purposes and intended for the personal use of such member or club.

(4) When established to the satisfaction of the Secretary to be consistent with the provisions of this chapter and other applicable Federal and State laws and published ordinances, the Secretary may authorize the transportation, shipment, receipt, or importation into the United States to the place of residence of any member of the United States Armed Forces who is on active duty outside the United States (or who has been on active duty outside the United States within the sixty day period immediately preceding the transportation, shipment, receipt, or importation), of any firearm or ammunition which is (A)

determined by the Secretary to be generally recognized as particularly suitable for sporting purposes, or determined by the Department of Defense to be a type of firearm normally classified as a war souvenir, and (B) intended for the personal use of such member.

(5) For the purpose of paragraph (3) of this subsection, the term "United States" means each of the several States and the District of Columbia.

(b) A licensed importer, licensed manufacturer, licensed dealer, or licensed collector who is indicted for a crime punishable by imprisonment for a term exceeding one year, may, notwithstanding any other provision of this chapter, continue operation pursuant to his existing license (if prior to the expiration of the term of the existing license timely application is made for a new license) during the term of such indictment and until any conviction pursuant to the indictment becomes final.

(c) A person who is prohibited from possessing, shipping, transporting, or receiving firearms or ammunition may make application to the Secretary for relief from the disabilities imposed by Federal laws with respect to the acquisition, receipt, transfer, shipment, transportation, or possession of firearms, and the Secretary may grant such relief if it is established to his satisfaction that the circumstances regarding the disability, and the applicant's record and reputation, are such that the applicant will not be likely to act in a manner dangerous to public safety and that the granting of the relief would not be contrary to the public interest. Any person whose application for relief from disabilities is denied by the Secretary may file a petition with the United States district court for the district in which he resides for a judicial review of such denial. The court

may in its discretion admit additional evidence where failure to do so would result in a miscarriage of justice. A licensed importer, licensed manufacturer, licensed dealer, or licensed collector conducting operations under this chapter, who makes application for relief from the disabilities incurred under this chapter, shall not be barred by such disability from further operations under his license pending final action on an application for relief filed pursuant to this section. Whenever the Secretary grants relief to any person pursuant to this section he shall promptly publish in the Federal Register notice of such action, together with the reasons therefor.

(d) The Secretary shall authorize a firearm or ammunition to be imported or brought into the United States or any possession thereof if the firearm or ammunition –

(1) is being imported or brought in for scientific or research purposes, or is for use in connection with competition or training pursuant to chapter 401 of title 10;

(2) is an unserviceable firearm, other than a machinegun as defined in section 5845(b) of the Internal Revenue Code of 1954 (not readily restorable to firing condition), imported or brought in as a curio or museum piece;

(3) is of a type that does not fall within the definition of a firearm as defined in section 5845(a) of the Internal Revenue Code of 1954 and is generally recognized as particularly suitable for or readily adaptable to sporting purposes, excluding surplus military firearms, except in any case where the Secretary has not authorized the importation of the firearm pursuant to this paragraph, it shall be unlawful to import any frame, receiver, or barrel of

such firearm which would be prohibited if assembled; or

(4) was previously taken out of the United States or a possession by the person who is bringing in the firearm or ammunition. The Secretary shall permit the conditional importation or bringing in of a firearm or ammunition for examination and testing in connection with the making of a determination as to whether the importation or bringing in of such firearm or ammunition will be allowed under this subsection.

(e) Notwithstanding any other provision of this title, the Secretary shall authorize the importation of, by any licensed importer, the following:

(1) All rifles and shotguns listed as curios or relics by the Secretary pursuant to section 921(a)(13), and

(2) All handguns, listed as curios or relics by the Secretary pursuant to section 921(a)(13), provided that such handguns are generally recognized as particularly suitable for or readily adaptable to sporting purposes.

(f) In the case of a person who knowingly violates section 922(p), such person shall be fined under this title, or imprisoned not more than 5 years, or both.

§ 926A. Interstate transportation of firearms

Notwithstanding any other provision of any law or any rule or regulation of a State or any political subdivision thereof, any person who is not otherwise prohibited by this chapter from transporting, shipping, or receiving a firearm shall be entitled to transport a firearm for any lawful purpose from any place where he may lawfully

possess and carry such firearm to any other place where he may lawfully possess and carry such firearm if, during such transportation the firearm is unloaded, and neither the firearm nor any ammunition being transported is readily accessible or is directly accessible from the passenger compartment of such transporting vehicle: Provided, That in the case of a vehicle without a compartment separate from the driver's compartment the firearm or ammunition shall be contained in a locked container other than the glove compartment or console.

§ 929. Use of restricted ammunition

(a)(1) Whoever, during and in relation to the commission of a crime of violence or drug trafficking crime (including a crime of violence or drug trafficking crime which provides for an enhanced punishment if committed by the use of a deadly or dangerous weapon or device) for which he may be prosecuted in a court of the United States, uses or carries a firearm and is in possession of armor piercing ammunition capable of being fired in that firearm, shall, in addition to the punishment provided for the commission of such crime of violence or drug trafficking crime be sentenced to a term of imprisonment for not less than five years.

(2) For purposes of this subsection, the term "drug trafficking crime" means any felony punishable under the Controlled Substances Act (21 U.S.C. 801 et seq.), the Controlled Substances Import and Export Act (21 U.S.C. 951 et seq.), or the Maritime Drug Law Enforcement Act (46 U.S.C. App. 1901 et seq.).

(b) Notwithstanding any other provision of law, the court shall not suspend the sentence of any person convicted of a violation of this section, nor place the person on probation, nor shall the terms of imprisonment run concurrently with any other terms of imprisonment, including that imposed for the crime in which the armor piercing ammunition was used or possessed. No person sentenced under this section shall be eligible for parole during the term of imprisonment imposed herein.

§ 930. Possession of firearms and dangerous weapons in Federal facilities

(a) Except as provided in subsection (d), whoever knowingly possesses or causes to be present a firearm or other dangerous weapon in a Federal facility (other than a Federal court facility), or attempts to do so, shall be fined under this title or imprisoned not more than 1 year, or both.

(b) Whoever, with intent that a firearm or other dangerous weapon be used in the commission of a crime, knowingly possesses or causes to be present such firearm or dangerous weapon in a Federal facility, or attempts to do so, shall be fined under this title or imprisoned not more than 5 years, or both.

(c) A person who kills or attempts to kill any person in the course of a violation of subsection (a) or (b), or in the course of an attack on a Federal facility involving the use of a firearm or other dangerous weapon, shall be punished as provided in sections 1111, 1112, and 1113.

(d) Subsection (a) shall not apply to –

(1) the lawful performance of official duties by an officer, agent, or employee of the United States, a State, or a political subdivision thereof, who is authorized by law to engage in or supervise the prevention, detection, investigation, or prosecution of any violation of law;

(2) the possession of a firearm or other dangerous weapon by a Federal official or a member of the Armed Forces if such possession is authorized by law; or

(3) the lawful carrying of firearms or other dangerous weapons in a Federal facility incident to hunting or other lawful purposes.

(e)(1) Except as provided in paragraph (2), whoever knowingly possesses or causes to be present a firearm in a Federal court facility, or attempts to do so, shall be fined under this title, imprisoned not more than 2 years, or both.

(2) Paragraph (1) shall nót apply to conduct which is described in paragraph (1) or (2) of subsection (d).

(f) Nothing in this section limits the power of a court of the United States to punish for contempt or to promulgate rules or orders regulating, restricting, or prohibiting the possession of weapons within any building housing such court or any of its proceedings, or upon any grounds appurtenant to such building.

(g) As used in this section:

(1) The term "Federal facility" means a building or part thereof owned or leased by the Federal Government, where Federal employees are regularly present for the purpose of performing their official duties.

(2) The term "dangerous weapon" means a weapon, device, instrument, material, or substance, animate or inanimate, that is used for, or is readily capable of, causing death or serious bodily injury, except that such term does not include a pocket knife with a blade of less than 2 1/2 inches in length.

(3) The term "Federal court facility" means the courtroom, judges' chambers, witness rooms, jury deliberation rooms, attorney conference rooms, prisoner holding cells, offices of the court clerks, the United States attorney, and the United States marshal, probation and parole offices, and adjoining corridors of any court of the United States.

(h) Notice of the provisions of subsections (a) and (b) shall be posted conspicuously at each public entrance to each Federal facility, and notice of subsection (e) shall be posted conspicuously at each public entrance to each Federal court facility, and no person shall be convicted of an offense under subsection (a) or (e) with respect to a Federal facility if such notice is not so posted at such facility, unless such person had actual notice of subsection (a) or (e), as the case may be.

Nos. 96-1654 and 96-8837

In the Supreme Court of the United States

OCTOBER TERM, 1997

FRANK J. MUSCARELLO, PETITIONER

v.

UNITED STATES OF AMERICA

DONALD E. CLEVELAND AND
ENRIQUE GRAY-SANTANA, PETITIONERS

v.

UNITED STATES OF AMERICA

ON WRITS OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT AND THE
UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

BRIEF FOR THE UNITED STATES

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QUESTION PRESENTED

Whether a defendant "carries" a firearm within the meaning of 18 U.S.C. 924(c) if the defendant has it with him in a locked glove compartment or the trunk of a vehicle in order to facilitate a drug transaction.

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OPINIONS BELOW

The opinion of the court of appeals in No. 96-1654 (96-1654 Pet. App. 1a-7a) is reported at 106 F.3d 636. The opinions of the district court (96-1654 Pet. App. 8a-11a, 12a-13a) are unreported. The opinion of the court of appeals in No. 96-8837 (96-8837 J.A. 86-114) is reported at 106 F.3d 1056. The opinions of the district court (96-8837 J.A. 45-57, 58-71) are unreported.

JURISDICTION

The judgment of the court of appeals in No. 96-1654 was entered on February 13, 1997. The petition for a

writ of certiorari was filed on April 18, 1997, and was granted on December 12, 1997. The judgment of the court of appeals in No. 96-8837 was entered on February 18, 1997. The petition for a writ of certiorari was filed on April 30, 1997, and was granted on December 12, 1997. The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

STATUTORY PROVISION INVOLVED

18 U.S.C. 924(c)(1) is reproduced in pertinent part in an appendix to this brief.

STATEMENT

On May 25, 1995, petitioner Muscarello entered a plea of guilty in the United States District Court for the Eastern District of Louisiana to one count of conspiracy to distribute marijuana, in violation of 21 U.S.C. 846, one count of distributing marijuana, in violation of 21 U.S.C. 841(a)(1), and one count of using or carrying a firearm during and in relation to a drug trafficking offense, in violation of 18 U.S.C. 924(c). Before petitioner was sentenced, he moved to quash or dismiss the Section 924(c) count of the indictment, in light of this Court's decision in *Bailey* v. *United States*, 516 U.S. 137 (1995). The district court granted the motion (96-1654 Pet. App. 8a-11a), and the court of appeals reversed. *Id.* at 1a-7a.

Following the entry of guilty pleas in the United States District Court for the District of Massachusetts, petitioners Cleveland and Gray-Santana were each convicted on one count of attempting to possess cocaine with intent to distribute it, in violation of 21 U.S.C. 846, and one count of using or carrying a firearm during and in relation to a drug trafficking crime, in violation of 18 U.S.C. 924(c). Petitioners were each sentenced to a total of 180 months' imprisonment, to be followed by five years' supervised release. The court of appeals affirmed. 96-8837 J.A. 86-114.

1. a. On May 25, 1995, petitioner Muscarello entered a plea of guilty to, *inter alia*, using or carrying a firearm during and in relation to a drug trafficking offense, in violation of 18 U.S.C. 924(c). 96-1654 J.S. 6-10. At the plea hearing, the government submitted a factual statement signed by Muscarello's attorney. *Id.* at 11-13. The statement established that, following negotiations with a cooperating individual (CI) and an undercover agent of the Drug Enforcement Administration (DEA), Muscarello arranged for the delivery of a total of eight pounds of marijuana in two separate transactions. Both the negotiations and the payment for the marijuana took place in Muscarello's Ford pick-up truck. In the first transaction, Muscarello led the CI and the DEA agent to a location where marijuana had been left in a plastic bag at the side of the road. In a second transaction on the same day, Muscarello again led the CI and the DEA agent to a certain location, and upon arrival, Muscarello removed plastic bags containing marijuana from his vehicle. Following Muscarello's arrest, a loaded firearm was found in the locked glove compartment of his truck. *Id.* at 12; 96-1654 Pet. App. 8a. The signed factual statement asserted that this firearm was "knowing[ly] possessed in [petitioner's] vehicle and carried for protection in relation [to] the above described drug trafficking offense." 96-1654 J.A. 12. At the plea hearing, Muscarello attested under oath to the accuracy of the written factual statement. *Id.* at 24.

b. On March 7, 1996, before Muscarello was sentenced, he filed a motion in the district court pursuant to Federal Rule of Criminal Procedure 12(b)(2) to

quash or dismiss the Section 924(c) count of the indictment. Muscarello argued that the charge was legally defective in light of this Court's decision in *Bailey*. 96-1654 Pet. App. 2a. The government opposed the motion on the ground that the factual statement established that petitioner had "carried" the firearm within the meaning of Section 924(c). Following a hearing, the district court granted the motion to dismiss. *Id.* at 8a-11a.

The court acknowledged that Muscarello admitted in the factual statement that he knowingly possessed and carried the firearm in his vehicle for protection in relation to his drug trafficking offenses. 96-1654 Pet. App. 9a-10a. The court relied instead, however, on the following statement from the presentence investigation report:

> As to the weapon, [petitioner] does not deny his possession of the pistol. The pistol was in the glove compartment of his truck where it had been for a long period of time. He denies any conscious decision to carry the gun in relation to the marijuana sale, and stated that he carried it in relation to his job with the Tangipahoa Parish Sheriff's Office as a balif [sic] at the Courthouse in Amite.

Id. at 10a. The court accordingly concluded that:

> [petitioner] did not knowingly possess the firearm *in relation* to a drug-trafficking crime. To the contrary, [petitioner], his employment background considered, knowingly possessed the firearm in the glove compartment of his vehicle in furtherance of his job requirements and not for active employment in the charged transaction.

Ibid. The district court therefore granted Muscarello's motion to dismiss the Section 924(c) count, although it did not rely on *Bailey* in doing so. 96-1654 Pet. App. 10a-11a.

The district court denied the government's motion for reconsideration. 96-1654 Pet. App. 12a-13a. The court again acknowledged that Muscarello had admitted carrying the gun for protection in relation to his drug trafficking, but the court noted that "this is a pre[-]*Bailey* composition by the government and a pre[-]*Bailey* consideration by [petitioner] and his counsel." *Id.* at 12a. Again citing the above-quoted language from the presentence report, the district court reaffirmed its conclusion that Muscarello "did *carry* a firearm in the [locked] glove compartment of his vehicle, but not *in relation* to the commission of a drug trafficking crime." *Id.* at 13a.

c. The court of appeals reversed in a per curiam decision. 96-1654 Pet. App. 1a-7a. The court first noted that, because *Bailey* did not address the "carrying" prong of Section 924(c), its prior "carrying" jurisprudence remained valid. *Id.* at 4a. Under the court's pre-*Bailey* decision in *United States* v. *Pineda-Ortuno*, 952 F.2d 98, 104 (5th Cir.), cert. denied, 504 U.S. 928 (1992), "the 'carrying' requirement of § 924(c) is met if the operator of the vehicle knowingly possesses the firearm in the vehicle during and in relation to a drug trafficking crime." 96-1654 Pet. App. 4a-5a.

The court held that the district court had erred in two respects in finding that the "in relation to" element of the offense was not satisfied: first, by discrediting as a "pre-*Bailey* composition" the factual statement in which Muscarello had concurred, and second, by relying on Muscarello's "post-conviction,

self-serving declaration to the probation officer * * * regarding his subjective intent in possessing the pistol in the truck." 96-1654 Pet. App. 5a. Those errors, the court concluded, required reversal of the district court's decision. *Id.* at 6a-7a.

The court also reaffirmed *Pineda-Ortuno*'s holding that "[w]hen a vehicle is used, 'carrying' takes on a different meaning from carrying on a person because the means of carrying is the vehicle itself." 96-1654 Pet. App. 6a. Thus, the court reasoned, "the fact that [petitioner's] glove compartment was locked does not prevent conviction." *Ibid.*

2. a. Petitioners Cleveland and Gray-Santana were charged, along with Juan Rodriguez and Ramon Vasquez, in a five-count superseding indictment with various narcotics and weapons offenses. At petitioners' respective plea hearings, the government presented a summary of its evidence that established the following facts, in which petitioners concurred. 96-8837 J.A. 9-16, 21-27.

Before October 18, 1994, petitioner Gray-Santana agreed with Rodriguez to purchase between five and eight kilograms of cocaine. Rodriguez arranged to procure the cocaine and transport it to Boston. Petitioners Gray-Santana and Cleveland then formulated a plan to steal some of the cocaine from Rodriguez, rather than purchase it. Pursuant to their plan to steal the cocaine, petitioners obtained weapons. 96-8837 J.A. 46-47, 59. At his guilty plea hearing, Cleveland admitted that for the purpose of carrying out the theft, he and Gray-Santana "assembled three weapons, placed them in a Louis Vuitton bag, [and] put the bag in [a] car" on the day of the planned transaction. *Id.* at 13, 14-16. Gray-Santana admitted

that he had purchased one of the weapons earlier that day. *Id.* at 26, 27.

In the meantime, DEA agents were conducting surveillance of a known drug trafficker at an apartment complex in Connecticut. The agents observed four individuals, including Rodriguez and Vasquez, leaving the complex. Rodriguez drove a white Isuzu, and Vasquez and two others drove a Lexus. The DEA agents followed the four men to Boston, where they observed the driver of the Lexus talking with Gray-Santana, who was sitting in a white Mazda driven by Cleveland. All three vehicles were later observed parked close together on St. Stephens Street in Boston. At that time, Vasquez was sitting in the back of the Mazda, and Gray-Santana was in the Isuzu with Rodriguez. As the vehicles attempted to leave the area, the DEA agents stopped and searched both the Mazda and the Isuzu. Six kilograms of cocaine were found in a hidden compartment of the Isuzu, and three handguns were found in the trunk of the Mazda. 96-8837 J.A. 46-47, 59-60. Two of the three handguns were semiautomatic, and all were loaded with live ammunition. *Id.* at 12, 25.

b. Petitioners Cleveland and Gray-Santana entered guilty pleas, respectively, on July 17, 1995, and July 21, 1995. 96-8837 J.A. 60, 47. After this Court decided *Bailey*, each petitioner sought relief from his Section 924(c) conviction. On January 11, 1996, after he had filed a notice of appeal from his final judgment of conviction, Cleveland filed a Motion for Correction of Sentence or Other Appropriate Relief, pursuant to Federal Rule of Criminal Procedure 35(c) and 28 U.S.C. 2255. 96-8837 J.A. 58. On December 8, 1995, after he had been sentenced but before a final judgment of conviction was entered, Gray-Santana filed a

similar motion. *Id.* at 45. Gray-Santana also sought to withdraw his plea. *Ibid.*[1]

The district court held that, in light of *Bailey*, petitioners' Section 924(c) convictions could not be sustained under the "use" prong of the statute. 96-8837 J.A. 48-49, 62-63. The court found, however, that the dictionary definition of "carry" reached petitioners' conduct of transporting firearms in a vehicle. *Id.* at 50, 64-65. The court rejected petitioners' contentions that First Circuit authority required that the weapon be immediately accessible to the defendant in order to sustain a conviction for "carrying" it. *Id.* at 51-55, 66-70. Instead, the court found that the evidence in the case was "a prime example of using a vehicle to carry firearms in relation to a drug trafficking crime," and it denied petitioners' motions. *Id.* at 56,70.

c. The court of appeals affirmed. 96-8837 J.A. 86-114. At the outset, the court agreed that petitioners' convictions could not be sustained under the "use" prong of Section 924(c) after *Bailey*, as there was no evidence that the firearms had been actively employed. *Id.* at 104. The court held, however, that petitioners had "carried" the firearms within the meaning of Section 924(c).

[1] The district court noted that, because Cleveland filed his motion more than seven days after sentencing, he could not obtain relief under Rule 35(c). 96-8837 J.A. 61. The court stated, however, that Cleveland could proceed under Section 2255. *Ibid.* With respect to Gray-Santana, the district court "treat[ed] the pending motion as a motion to reconsider sentencing, and, in the alternative, to withdraw his plea," and the court "conclude[d] that it is appropriate to decide defendant Gray[-Santana]'s challenge to the sentence on the merits." *Id.* at 45.

The court of appeals reasoned that a firearm can be "carried" in a vehicle, as well as on a suspect's person. 96-8837 J.A. 105-106. The court also held, in agreement with several other circuits, that a firearm transported in a vehicle need not be immediately accessible to the defendant in order to be "carried" under Section 924(c). *Id.* at 106-107. After considering the ordinary meaning of "carry," the court found that the term "clearly includes the transport of a firearm by car; the concept of whether or not the carried item is within reach plays no part in the definition." *Id* at 108. The court recognized that in some circumstances, "a firearm's immediate accessibility to a defendant might be relevant to determining whether or not he was carrying it 'during and in relation to' a drug trafficking crime," but the court concluded that that statutory element was satisfied in this case. *Id.* at 110. Finally, the court analyzed decisions of the Second, Sixth, and Ninth Circuits—which had held that immediate accessibility is required under the "carry" prong—and concluded that the reasoning of those courts was "unpersuasive." *Id.* at 111-113.[2]

SUMMARY OF ARGUMENT

Section 924(c)(1) punishes any person who "uses or carries" a firearm during and in relation to a drug trafficking offense. Section 924(c)'s prohibition on "carr[ying] a firearm" includes the act of carrying a firearm in a vehicle. That conclusion follows from the ordinary meaning of the term "carry," as confirmed

[2] The court of appeals rejected petitioners' Fourth Amendment challenge to the search of the vehicles, 96-8837 J.A. 99-1100, and Gray-Santana's claims that a statement he had made to a DEA agent was involuntary and taken despite his previous invocation of his right to counsel, *id.* at 100-103.

by the primary entries for the word in every authoritative dictionary. Although to "carry" firearms also includes carrying firearms on one's person, there is no basis for limiting the term in that way. Petitioners cite no court anywhere that has adopted their suggestion that the unqualified word "carry" in a firearms statute like Section 924(c) is restricted to carrying on the person. Nor is there any basis in any standard dictionary definition to limit the term "carry" to instances in which the item carried is immediately accessible to the person carrying it. Although accessibility may be of relevance in analyzing the "in relation to" element of Section 924(c), it has nothing to do with whether a firearm is "carried" for purposes of Section 924(c).

The legislative history of Section 924(c) confirms that, when Congress first adopted the statute with its "carry" prohibition, Congress intended no restriction on the means by which the firearm could be carried. The debates surrounding the enactment of Section 924(c)'s "carry" prohibition make the purpose of the statute clear: to give offenders who intend to commit Section 924(c)'s predicate offenses a powerful incentive to leave their guns at home. Under petitioner's approach, however, that incentive would disappear so long as the offender is careful to remove the firearm from his person and place it in his car. The evidence surrounding the enactment of Section 924(c) does not support such an incongruous construction. Nor did Congress intend to eliminate the incentive so long as the offender placed the firearm in a vehicle so that it would be out of immediate reach until the time it was needed—although that would be the result of adopting the "immediate accessibility" construction articulated by two courts of appeals.

Congress's intent is also demonstrated by its consistent use of the term "carry firearms" in dozens of statutes to refer to carrying—sometimes out of the range of immediate access—in a vehicle as well as on the person. Had Congress intended to adopt an additional "on the person" limitation, established legal terms for doing so were ready at hand. State concealed weapons statutes, for example, almost always add the qualification "on the person" and/or "in a vehicle" to their basic "carry" prohibition. Those statutes are drafted in that way precisely because the word "carry" is most naturally taken to refer to both means of carrying.

Petitioners rely on the stiff penalty scheme in Section 924(c) as an indication that Congress desired an extraordinarily narrow construction of the term "carry." That reliance is misplaced, since the severity of the penalty scheme merely shows Congress's determination to accomplish its deterrent purpose. In any event, Congress originally used the word "carry" in Section 924(c) at a time when the statute imposed much less severe sanctions. Petitioners also repeatedly argue that the fact that isolated comments in the legislative history refer to carrying on the person establishes a congressional intent to limit the statute in that way. But the fact that Section 924(c) does apply to carrying on the person, as indicated by those comments, in no way suggests that it does not apply to carrying in a vehicle. Finally, the rule of lenity can be of no assistance to petitioners here, since that rule does not require the adoption of every proffered narrow construction of each term in a criminal statute. Where, as here, the ordinary meaning of a statutory term is the only meaning that is consistent with the statutory purpose and with the way Congress

uses that term in other contexts, the rule of lenity has no application.

ARGUMENT

A FIREARM IS "CARRIED" WHENEVER IT IS TRANSPORTED IN A VEHICLE, REGARDLESS OF WHETHER IT IS WITHIN THE DEFENDANT'S IMMEDIATE REACH.

A. The Ordinary Meaning Of The Word "Carry" Includes Carrying By Vehicle As Well As On The Person

Under 18 U.S.C. 924(c), a person commits a criminal offense if that person "during and in relation to any crime of violence or drug trafficking crime * * * uses or carries a firearm." 18 U.S.C. 924(c)(1). Congress did not define "carries" in Section 924(c). The term therefore must be construed "in accord with its ordinary or natural meaning." *Smith* v. *United States*, 508 U.S. 223, 228 (1993) (analyzing "use" prong of 18 U.S.C. 924(c)); see also *Perrin* v. *United States*, 444 U.S. 37, 42 (1979) (ascribing ordinary meaning to undefined words is "[a] fundamental canon of statutory construction").

1. Major dictionaries show a remarkable unanimity in expressly referring *both* to movement via a vehicle *and* to movement on one's person in the primary definition of the term "carry." According to *Webster's New International Dictionary of the English Language* 412 (2d ed. 1958)—an authoritative dictionary that was available when Section 924(c)'s "carry" prohibition was first enacted in 1968 and on which this Court relied in *Smith*, see 508 U.S. at 228-229, and in *Bailey* v. *United States*, 516 U.S. 137, 145 (1995)—the first definition of the term "carry" is "[t]o convey, or transport, while supporting, originally in a cart or car, hence in any manner; to bear; to transfer; to transmit; to take." As that definition makes clear, not only does the term "carry" include carrying by means of a vehicle, but the term originally bore that reference as its primary meaning. See also *Webster's Third New International Dictionary, Unabridged* 343 (1986) ("carry" derived from the French "carier," meaning "to transport in a vehicle").[3]

The other major, authoritative dictionary of American English available in 1968 similarly makes clear that an item may be carried either in a vehicle or on one's person. According to *The Random House Dictionary of the English Language* 227 (1966), the first definition of the term "carry" is "to move while supporting; convey; transport." Of the two examples of usage given in that dictionary, one refers to carrying on the person ("*He carried her for a mile in his arms.*", *ibid.*) and the other refers to carrying via a vehicle ("*This elevator cannot carry more than 10 persons.*", *ibid.*). The more recent edition of the same dictionary similarly defines "carry" in terms that have clear application to carrying both in a vehicle

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[3] The most recent edition of the same dictionary similarly lists, as the first definition for "carry," a meaning that specifically refers to movement via a vehicle, as well as on one's person:

> to move while supporting (*as in a vehicle* or in one's hands or arms): move an appreciable distance without dragging: sustain as a burden or load and bring along to another place.

Webster's Third New International Dictionary, Unabridged 343 (1986) (emphasis added).

and on the person.[4] In short, the primary definition of the term "carry," which as the first one listed is "the most frequently encountered meaning[]," *id.* at xxix, cannot be read to have the restrictive meaning ascribed to it by petitioners, which would exclude movement on a vehicle.

It is true, as petitioners observe (96-1654 Pet. Br. 9; 96-8837 Pet. Br. 9), that the term "carry" may refer to the transportation of an object in a pocket or otherwise on one's person. That is clear from the primary definition of the term given above. But that provides no basis for arguing that Congress intended to use the term "carry" in a way that was *limited* to carrying on the person. Thus, the edition of *Webster's New International Dictionary* available in 1968 lists, as its third definition of the term "carry,"

> To support; to sustain; specif.: * * * To have or hold as a burden while moving from place to place; to have upon or about one's person; to contain; hold; bear about; as, to *carry* a wound; to *carry* an unborn child.

Id. at 412. The same dictionary defines "carry arms" to mean "[t]o bear weapons; to serve as a soldier." *Ibid.* Those definitions indicate that "to carry firearms" *may* refer to bearing arms on the person. They provide no support, however, for petitioners' contention that the term does *not* refer to carrying by other means, such as in a vehicle. To the contrary, the examples given ("to *carry* a wound" or "to *carry*

[4] The first definition given is "to take or support from one place to another; convey; transport." *The Random House Dictionary of the English Language, Unabridged* 319 (2d ed. 1987). The same two examples used in the 1966 edition are repeated in the 1987 edition.

an unborn child") appear to use the word in a different sense from petitioners' "on the person" construction. And even the definition of "to carry firearms" suggests service as a soldier—once again a context that has little to do with Section 924(c).

The other major authoritative dictionary available in 1966 similarly does not support petitioners' argument. The 1966 edition of the *Random House Dictionary* lists, as the second meaning of the term, "to wear, hold, or have around one: *He carries his change in his pocket. He carries a cane.*" *Id.* at 227. That definition does not mention weapons or firearms. It thus provides no support for petitioners' contention that "carry," when used with the word "firearm" as in Section 924(c), refers only to carrying on the person and could not refer to other means of carrying as well.

2. Much the same conclusion emerges from *Black's Law Dictionary*, the authority on which petitioners place their primary reliance. Like the general purpose dictionaries cited above, the 1968 edition of *Black's* defines "carry" to refer to carrying both on the person and in a vehicle:

> To bear, bear about, sustain, transport, remove, or convey. To have or bear upon or about one's person, as a watch or weapon;—locomotion not being essential.

Black's Law Dictionary 269 (rev. 4th ed. 1968). That definition recognizes that firearms may be carried either on the person or through other means. It is therefore fully consistent with the definition of "carry" to include carrying in a vehicle.

Petitioners place their major reliance on an additional entry in *Black's* for the term "carry arms

or weapons." See 96-1654 Pet. Br. 10; 96-8837 Pet. Br. 10, 11 n.4, 14 n.9, 17. That entry reads:

> To wear, bear, or carry them upon the person or in the clothing or in a pocket, for the purpose of use, or for the purpose of being armed and ready for offensive or defensive action in case of a conflict with another person. State v. Carter, 36 Tex. 89; State v. Murray, 39 Mo. App.128.

Black's Law Dictionary 270 (rev. 4th ed. 1968).[5] Of course, the fact that "carry" may be used in this sense in no way suggests that Congress intended this to be the *exclusive* meaning of the word, nor does *Black's Law Dictionary* so imply. But in any event, the two cases cited in the *Black's Law Dictionary* entry demonstrate that the entry was not intended to be authority for the argument that the word "carry," as used in Section 924(c), refers *solely* to carrying on the person.

In both of the cases cited in the *Black's Law Dictionary* entry for "carry arms or weapons," a defendant was convicted under a nineteenth century statute that, as is typical of state concealed weapons statutes both at that time and today, see pp. 34-39, *infra*, expressly prohibited carrying concealed weapons *on the person*. See *State* v. *Murray*, 39 Mo. App. 127, 128 (1890) ("The defendant was indicted * * * for carrying concealed *upon his person* a dangerous and deadly weapon.") (emphasis added); Mo. Rev. Stat.

[5] The quoted definition is from the edition of *Black's Law Dictionary* that was available in 1968, when Section 924(c) was enacted. The most recent, 1990 edition, which petitioners cite instead, gives an identical definition, but it omits the case citations. As we discuss in text below, those citations are of great value in understanding the definition.

§ 3502 (1889) (statute prohibiting a person from "carry[ing] concealed *upon or about his person* any deadly or dangerous weapon") (emphasis added); *State* v. *Carter*, 36 Tex. 89, 89 (1871) (defendant indicted for carrying a weapon "about his person"); 1879 Tex. Crim. Stat. tit. IX, art. 318 (Penal Code) (statute prohibiting a person from "carry[ing] *on or about his person*, saddle, or in his saddle bags, any pistol") (emphasis added). By expressly qualifying the word "carry" with the term "on or about his person" or "upon his person," the legislatures that enacted those statutes showed the common understanding that the term "carry," as used in Section 924(c) without that qualification, would have a broader meaning. The *Black's Law Dictionary* entry may provide useful guidance in cases involving other issues about the meaning of the word "carry."[6] But it provides no support whatever for petitioners' claim that "carry," as used in Section 924(c) without the qualifying phrase "on the person," is nonetheless limited to carrying on the person.[7]

[6] For example, *Murray* involved the legal question whether the Missouri statute required proof that the defendant had the "intention to use [the firearm] as a weapon." 39 Mo. App. at 131. *Carter* involved the question whether an allegation in an indictment that the defendant "did have about his person a certain pistol" was sufficient under the Texas statute if it "did not charge that * * * defendant did 'carry' the weapon." 36 Tex. at 89. The holding in *Carter* that it did supports the indisputable fact that a firearm may be carried on the person. It does not, however, provide any support for petitioners' contention that a firearm may not be carried by other means—such as in a vehicle.

[7] An earlier edition of *Black's Law Dictionary* lists three additional cases in the entry for "carry arms or weapons." *Black's Law Dictionary* 283 (3d ed. 1933). Those cases simi-

3. No court of appeals has adopted petitioners' construction of "carry" to include only carrying on the person and to exclude carrying in a vehicle. And most courts to reach the issue have concluded, like the courts below, that "carry" in Section 924(c) is used in its ordinary sense and can refer to a variety of means of carrying, such as carrying on the person and carrying in a vehicle.[8] Two courts of appeals,

larly make clear that the entry should not be taken as authority for petitioners' argument. One of them, *State* v. *Roberts*, 39 Mo. App. 47 (1890), was brought under the same "upon the person" concealed weapons statute as *Murray*, and it involved a similar question regarding whether the defendant had to be shown to have the intent to carry the firearm for use as a weapon. The second cited case, *Owen* v. *State*, 31 Ala. 387 (1857), involved a prosecution brought under a statute that prohibited a person from "carry[ing] concealed *about his person* a pistol." *Id.* at 388 (emphasis added). The third cited case, *Moorefield* v. *State*, 73 Tenn. 348 (1880), arose under a statute that provided that "[n]o person shall publicly ride or go armed to the terror of the people; or privately carry any dirk, large knife, pistol, or any other dangerous weapon, to the fear or terror of any person." Tenn. Comp. Stat. § 4753 (Thompson & Steger eds., 1873). The case involved the question whether the defendant, who was armed with a pistol "for the purpose of joining in a chase for bear," could be said to have been acting "for evil purposes, or for the purpose of being armed, in the sense of the statute." 73 Tenn. at 348-349. The statute at issue does not use the term "carry," and the report does not specify how the defendant carried the pistol and whether he walked or used some other means of transportation to hunt the bear. As in the later edition of *Black's*, these citations establish that the dictionary entry was not intended to address whether the term "carry firearms" refers to carrying in a vehicle, as well as on the person.

[8] Aside from the First and Fifth Circuits in the instant cases, the Seventh, Fourth, Tenth, and Eleventh Circuits have taken this position. See, *e.g.*, *Wilson* v. *United States*, 125 F.3d

however, have concluded that, although Section 924(c) is not limited to carrying on the person, its application is limited to weapons that are immediately accessible or that satisfy a similar locution.[9] Petitioners suggest that, as an alternative to their entirely novel limitation on the term "carry" in Section 924(c) to mean "carry on the person," this Court could adopt the minority immediate accessibility limitation. See 96-1654 Pet. Br. 20-22; 96-8837 Pet. Br. 43-49.

No definition of "carry" in any dictionary supports the proposition that the word refers only to items—whether firearms or otherwise—that are immediately accessible. It is no doubt true that a weapon that is carried on the person will ordinarily be more or less

1087, 1092 (7th Cir. 1997) ("We disagree with and cast aside the 'immediate access' theory as espoused by the Second, Sixth, and Ninth Circuits."); *United States* v. *Mitchell*, 104 F.3d 649, 653 (4th Cir. 1997) ("[T]he plain meaning of the term 'carry' * * * requires knowing possession and bearing, movement, conveyance, or transportation of the firearm in some manner."); *United States* v. *Miller*, 84 F.3d 1244, 1259 (10th Cir. 1996) ("[T]he government is required to prove only that the defendant transported a firearm in a vehicle and that he had actual or constructive possession of the firearm while doing so."), cert. denied, 117 S. Ct. 443 (1997); *United States* v. *Quinn*, 123 F.3d 1415, 1426, 1428 (11th Cir. 1997) (government must prove only "actual transporting" of firearm under carry prong; immediate availability requirement rejected).

[9] See *United States* v. *Foster*, No. 89-10405, 1998 WL 2521, *5 (9th Cir. Jan. 5, 1998) (en banc) ("immediately available"); *United States* v. *Cruz-Rojas*, 101 F.3d 283, 285 (2d Cir. 1996) ("within reach"). The Sixth Circuit had taken the position that immediate accessibility is required, see, *e.g.*, *United States* v. *Riascos-Suarez*, 73 F.3d 616, cert. denied, 117 S. Ct. 136 (1996), but the issue is currently under *en banc* submission in that circuit. *United States* v. *Malcuit*, 104 F.3d 880, vacated and rehearing en banc granted, 116 F.3d 163 (1997).

accessible. Nonetheless, even in the case of carrying on the person, a weapon may be carried though its accessibility is quite limited. For example, it would ordinarily be said that a person who places a weapon in a locked briefcase and then takes the briefcase in his hand as he walks down the street has "carried" the weapon. Cf. *State* v. *Molins*, 424 So. 2d 29, 30 (Fla. Dist. Ct. App. 1982) (gun encased in zippered gun bag enclosed in zippered canvas bag held to be "carried"); *Nardo* v. *State*, 819 P.2d 903, 905-906 (Alaska Ct. App. 1991) ("case law from around the country supports the proposition that a person who carries a deadly weapon in a purse, a briefcase, or even a paper bag commits the offense of carrying a concealed weapon"). Immediate accessibility is not a criterion of whether the weapon is carried—either in a vehicle or on the person.[10]

Indeed, contrary to the petitioners' alternative view, the immediate accessibility requirement requires "the obviously foolish conclusion" that if an object is not within reach, "the individual is no longer carrying the object, but is doing something else." *United States* v. *Miller*, 84 F.3d 1244, 1260 (10th Cir.), cert. denied, 117 S. Ct. 443 (1996). Adopting that conclusion would be directly contrary to the way the term is ordinarily used. For example, it would be perfectly natural for the driver of a car to say that he

[10] As the First Circuit noted, see 96-8837 J.A. 110, the location of the firearm in a vehicle and its accessibility to the defendant (although not necessarily at the moment of arrest) may be relevant under some circumstances in determining whether the "in relation to" element of Section 924(c) is satisfied. See *United States* v. *Miller*, 84 F.3d 1244, 1260 (10th Cir.), cert. denied, 117 S. Ct. 443 (1996). It has no bearing, however, on whether the weapon is "carried."

"carries" a spare tire in his trunk or a flashlight in his glove compartment for use in emergencies, regardless of the fact that those items may be thought not to be immediately accessible to the driver or a passenger. But cf. p. 43, *infra*. Neither petitioners nor any standard reference offers any reason to believe that the Congress that enacted Section 924(c) intended that the term "carries" in Section 924(c) should be construed in any more limited sense.

4. Petitioners contend (96-8837 Pet. Br. 19-20) that because Congress used the terms "possess" and "transport" in other firearms provisions, it thereby "precluded a broad definition of the term 'carry' that would be synonymous with either 'transportation' or 'possession.'" See also 96-1654 Pet. Br. 13-14. We do not urge, however, a meaning for the term "carry" that is interchangeable with either "possess" or "transport."

We do not argue that carrying a firearm in a vehicle is in any way synonymous with possessing it. A person may possess a firearm without touching it, moving it, bearing it, or carrying it; that is the focus of "possession" statutes like 18 U.S.C. 922(g), which makes it illegal for felons and others to "possess" firearms. It is true that, under any view of the meaning of the word "carry," the act of carrying a firearm—whether on the person or in a vehicle—also involves possession of it. But, under both petitioners' view and ours, proof of possession alone does not amount to proof of carrying.[11]

[11] Petitioners argue (96-8837 Pet. Br. 36) that "[i]n the context of a moving vehicle," our "definition of 'carry' swallows entirely any meaningful role for 'use,' since *any* possession of the firearm under that definition constitutes 'carrying.'" Of

As the dictionary definitions cited above demonstrate, "carry" and "transport" are closely related. The terms do, however, have different connotations, such that Congress wisely chose to use each term in an appropriate setting in the federal gun control statutes. A leading dictionary of synonyms explains:

> **Carry, bear, convey, transport, transmit** come into comparison when they mean to be, or to serve as, the agent or the means whereby something (or someone) is moved from one place to another. **Carry** originally and still often implies the use of a cart or carriage (now a train, ship, automobile, airplane or the like * * *) but it may imply a personal agent * * * **Transport** is used in place of *carry* or *convey* when the stress is on the movement of persons or goods from one place to another, as in vessels or in railway trains.

Webster's Dictionary of Synonyms 141 (1st ed. 1942). Thus, the word "transport" is most often used when the emphasis is on bare movement, bulk goods, and common carriers, while the broader term "carry"

course, the same could be said of petitioners' theory: in the context of a moving person, petitioners' definition of "carry" swallows entirely any meaningful role for "use," since *any* possession of the firearm on a moving person constitutes "carrying." The point is that, under both definitions, there will be cases in which the firearm is used but not carried (when, for example, it is purposely displayed by a drug dealer conducting a transaction at his home), and cases in which it is carried but not used (when, for example, it is borne on the person or—in our view—in a vehicle). Cf. *Bailey*, 516 U.S. at 146 (interpreting "use" to require "active use" so that each term in statute has "a particular, nonsuperfluous meaning").

emphasizes personal agency and movement either on a vehicle or by hand.[12]

Those distinctions amply explain Congress's use of "transport" in Section 924(b) and other related statutes, but not in Section 924(c). Section 924(b) makes it a crime for any person to "ship[], transport[], or receive[] a firearm or any ammunition in interstate or foreign commerce" with the "intent to commit therewith" a serious offense or with "cause to believe that a[] [serious] offense * * * is to be committed therewith." 18 U.S.C. 924(b). The emphasis of that provision, therefore, "is on the movement of [firearms] from one place to another," specifically, in interstate or foreign commerce. *Webster's Dictionary of Synonyms* 141 (1st ed. 1942). Hence, a paradigmatic violation of Section 924(b) might involve a defendant placing firearms in a box and sending them by mail to a confederate in another state—conduct that in common parlance is most accurately described as "transporting" the firearms. By contrast, a paradigmatic violation of Section 924(c) involves a defendant who brings a firearm with him to the site of a drug deal. If the defendant does so in a vehicle, the defendant would be said to be carrying the firearm, not transporting it,

[12] See also *Random House Dictionary of the English Language* 227 (1966) (noting that "transport" means to carry goods "usually by vehicle or vessel," while "carry" "means to take by means of the hands, of a vehicle, etc."); *Webster's Third New International Dictionary, Unabridged* 343 (1986) ("carry" means "moving to a location some distance away while supporting or maintaining off the ground" and "is a natural word to use in ref. to cargoes and loads on trucks, wagons, planes, ships, or even beasts of burden," while "transport refers to carriage in bulk or number over an appreciable distance and, typically, by a customary or usual carrier agency").

just as a person who brings a spare tire or flashlight with him in a vehicle would be said to be carrying those items, not transporting them. Congress chose in Sections 924(b) and 924(c) the verb which was most nearly suited to capture the run of cases. The use of the term "transport" in Section 924(b) and in some other statutes provides no basis for this Court to impose an additional requirement for "carrying" that finds no basis in the plain meaning of the term.

B. The Legislative History Of Section 924(c) Supports The Application Of That Prohibition To Carrying In A Vehicle As Well As On The Person

The legislative purpose underlying Section 924(c), as authoritatively expressed by the sponsor of the legislation and repeated during the debate surrounding its passage, is to encourage those who would commit the predicate offenses to leave their guns at home. That purpose would be disserved by petitioners' addition of an "on the person" element to the statute. On the other hand, Congress's purpose is precisely consonant with the ordinary meaning of the word "carries" to encompass carrying both on the person and in a vehicle.

1. As originally enacted in the Gun Control Act of 1968, Section 924(c) imposed criminal penalties providing that anyone who

> (1) uses a firearm to commit any felony which may be prosecuted in a court of the United States, or (2) carries a firearm unlawfully during the commission of any felony which may be prosecuted in a court of the United States, shall be sentenced to a term of imprisonment for not less than one year nor more than 10 years.

Pub. L. No. 90-618, § 102, 82 Stat. 1224.[13] Because the provision was offered as an amendment on the House floor, it was not the subject of any hearings or committee reports. See 114 Cong. Rec. 22,231 (1968); *Simpson* v. *United States*, 435 U.S. 6, 13 & n.7 (1978). The amendment's sponsor, Representative Poff, explained the amendment at some length when he introduced it. This Court has commented that Representative Poff's comments are "probative" and "entitled to weight" as an exposition of the statute's purposes. *Simpson*, 435 U.S. at 13. See also *id.* at 14; *Busic* v. *United States*, 446 U.S. 398, 405 (1980) (relying on "crucial material" encompassed in Rep. Poff's comments in construing Section 924(c)). His comments are inconsistent with petitioners' position in this case.

One of the crucial features of the Poff amendment, which became Section 924(c), was the one-year mandatory minimum sentence. That minimum was referred to repeatedly in the House debate, and it was central to Congress's choice of the Poff amendment over competing measures that were under consideration. In describing the impact of this crucial feature of his amendment, Rep. Poff explained that "[t]he effect of a minimum mandatory sentence in this case *is to persuade the man who is tempted to commit a Federal felony to leave his gun at home.*" 114 Cong. Rec. 22,231 (1968) (emphasis added). That comment was echoed by others during the debate. See *id.* at 22,242 (noting resolution of local group of law enforcement personnel "that carrying short firearms in motor ve-

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[13] The statute provided for enhanced penalties of five to twenty five years for second and subsequent convictions. § 102, 82 Stat. 1224.

hicles be classified as carrying such weapons concealed") (Rep. May), 22,243-22,244 (statutes would apply to "the man who goes out taking a gun to commit a crime") (Rep. Hunt), 22,244 ("Of course, what we are trying to do by these penalties is to persuade the criminal to leave his gun at home.") (Rep. Randall); see also *id.* at 22,236 ("We are concerned * * * with having the criminal leave his gun at home.") (Rep. Meskill).[14] As this Court explained in *Smith*, 508 U.S. at 240, Congress directed Section 924(c) at the "dangerous combination" posed by drugs and guns.

The Poff amendment was not intended to persuade defendants, if they wanted to take guns with them, to be sure to put them on the seat, in the glove compartment, or in the trunk of a vehicle. Rather, the expressed purpose of the statute was to persuade those who intend to commit such crimes "to leave [their] gun at home." 114 Cong. Rec. 22,231 (1968). To read

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[14] Discussing the fact that the Poff Amendment was limited to those who carried a gun unlawfully, Rep. Meskill stated that Section 924(c) "should apply to every person whether he carries a gun lawfully or unlawfully, if he commits a Federal felony *while he has a firearm on his person*." 114 Cong. Rec. 22,236 (1968) (remarks of Rep. Meskill) (emphasis added). That casual statement, however, by a Member who was not a sponsor or leading supporter of the Poff amendment, likely reflects nothing more than an assumption about how guns are frequently "carried," rather than the improbable judgment that that is the *only* way they may be carried. And in any event, Rep. Meskill also used broader language, stating that Congress should not create a class of people "who can go out with firearms *in their possession*, commit Federal felonies, and be immune from the provisions of [Section 924(c)]." *Ibid.* (emphasis added). That broader wording undercuts any significance that might otherwise attach to Rep. Meskill's use of the phrase "on his person."

into Section 924(c) an additional element requiring that the firearm be carried on the person—or even to add that the gun must have been immediately accessible to the defendant—would do violence to that purpose. The means by which the gun would be carried—whether on the person or in a vehicle—was irrelevant to the Congress that enacted the statute.

Indeed, the facts of these cases demonstrate that a gun carried in a vehicle—even in a manner that renders it arguably less than immediately accessible—presents precisely the "grave possibility of violence and death," *Smith*, 508 U.S. at 240, that Congress sought to prevent in enacting and subsequently amending Section 924(c)(1). Petitioner Cleveland and Gray-Santana admitted that they planned to steal drugs from drug dealers and, after arranging a meeting, procured guns, rope, and duct tape, and put all of those items in a bag in the trunk of their car. See pp. 6-7, *supra*. Because they were arrested at the rendezvous with the drug dealers but before they had the opportunity to consummate their plan, the guns were not immediately accessible at the time of arrest. Nonetheless, they undoubtedly carried the guns in their car during and in relation to a drug trafficking crime, and that carrying presented precisely the dangers of violence that would have been presented had they carried the guns in the same bag but proceeded on foot. Similarly, petitioner Muscarello had the gun available in his glove compartment for "protection" during his drug deals, see 96-8837 J.A. 12; he could have retrieved it at any moment to initiate or escalate the violence that all too frequently accompanies drug transactions. These scenarios are typical of cases arising under the "carry" prong of Section 924(c). Congress enacted Section 924(c) in order to deter

offenders from carrying guns in the ways petitioners did in these cases.

2. There is nothing elsewhere in the legislative history that contradicts Rep. Poff's statement regarding the statute's purpose or that indicates a congressional desire to limit the ordinary term "carry" to one particular means of carrying. As petitioners note (96-1654 Pet. Br. 18; 96-8837 Pet. Br. 33-34), a few Members of Congress referred to examples of individuals carrying guns on their persons during the debate over the Poff Amendment. In 1984, when Congress amended Section 924(c) in several significant respects as part of the Comprehensive Crime Control Act of 1984, Pub. L. No. 98-473, Tit. II, ch. X, § 1005(a), 98 Stat. 2138-2139,[15] the Senate Report similarly gives an example of "carrying" that refers to carrying on the person.[16] Those examples amply support the proposition on which we and petitioners agree—that one may violate the statute by carrying a firearm on his person. None of the comments, however, suggests that Congress—or, indeed, that any member of Congress—believed that that would be the *only* means of carrying that the statute prohibits. See *Wilson* v. *United States*, 125 F.3d 1087, 1090 (7th Cir. 1997). Nor do any of the cited comments suggest that Congress's purpose in enacting the statute was anything other than what Rep. Poff said it was.

[15] Following the 1984 amendment, Section 924(c) read in pertinent part as follows:

> Whoever, during and in relation to any crime of violence, including a crime of violence which provides for an enhanced punishment if committed by the use of a deadly or dangerous weapon or device, for which he may be prosecuted in a court of the United States, uses or carries a firearm, shall, in addition to the punishment provided for such crime of violence, be sentenced to imprisonment for five years.

98 Stat. 2138.

[16] The report stated that "the requirement that the firearm's use or possession be 'in relation to' the crime would preclude its application in a situation where its presence played no part in the crime, *such as a gun carried in a pocket* and never displayed or referred to in the course of a pugilistic barroom fight." S. Rep. No. 225, 98th Cong., 1st Sess. 314 n.10 (1983) (emphasis added).

In *Smith*, this Court considered and rejected an argument analogous to that advanced by petitioners here. It was argued in *Smith* that "use" of a firearm refers only to "the most familiar use to which a firearm is put—use as a weapon," and that use of a firearm in barter for drugs was accordingly not covered by Section 924(c). 508 U.S. at 230. Finding a "significant flaw" in that argument, *ibid.*, the Court held that "[b]oth a firearm's use as a weapon and its use as an item of barter fall within the plain language of § 924(c)(1)." *Id.* at 240. As the Court explained, "[t]hat one example of 'use' is the first to come to mind when the phrase 'uses . . . a firearm' is uttered does not preclude [the Court] from recognizing that there are other 'uses' that qualify as well." *Id.* at 230. Similarly, the recognition by Members of Congress that a firearm may be carried on the person does not lead to petitioners' conclusion that Congress intended to exclude other means of carrying from the scope of the statute. As discussed above, the purpose of the statute and its plain language are quite to the contrary.

3. The enactment history of Section 924(c) also disposes of another of petitioners' contentions. Petitioners argue (96-1654 Pet. Br. 15-16; 96-8837 Pet. Br. 26-29) that the mandatory minimum five-year

sentence—which may be enhanced depending on the type of firearm and whether the offense is a repeat offense—imposed for violations of Section 924(c) militates in favor of limiting the statutory prohibition to cases in which the firearm is carried on the person. On that basis, petitioners argue that Congress would have wanted such a severe sanction to be limited to a relatively small number of cases.

Petitioners' reasoning is unsound. Congress no doubt specified severe sanctions for violations of Section 924(c) because Congress wanted sufficient deterrence "to persuade the man who is tempted to commit a Federal felony to leave his gun at home," in Representative Poff's words. 114 Cong. Rec. 22,231 (1968). Although petitioners may disagree with Congress's policy judgment on that point, that disagreement does not provide a basis to limit the statute's reach by engrafting on to it an "on the person" element.

In any event, the penalties to which petitioners refer would be a particularly unsound foundation for interpretation of the term "carries" in the statute. At the time Congress enacted the original "carries a firearm" prohibition in Section 924(c) in 1968, the penalties to which petitioners refer were not part of the statute. Instead, the statute was enacted with a more flexible penalty scheme that provided for a sentence of one to ten years' imprisonment for a first offense, with a sentence of five to twenty-five years for a second or subsequent offense. § 102, 82 Stat. 1224. It would be highly anachronistic to base any construction of the term "carries" in Section 924(c) on a penalty scheme that was added many years after

the basic prohibition on "carr[ying] a firearm" was included in the statute.[17]

C. A Comparison Of Section 924(c) To Other Statutory Models Supports A Construction Of "Carry" To Cover Carrying In A Vehicle

It is a cardinal principle of statutory construction that language used in a statute should be read to harmonize with similar usages in related bodies of law. *Reno* v. *Koray*, 515 U.S. 50, 56-57 (1995); *Gozlon-Peretz* v. *United States*, 498 U.S. 395, 407-408 (1991). Here, that principle is significant because the word "carry" appears in numerous firearms laws that plainly reach carrying in a car. Moreover, Congress had available to it, but chose not to employ, a well-established model—state concealed weapons statutes—had it wished to impose the "on the person" limitation petitioners support.

1. In other statutes, Congress frequently uses the word "carry" in its ordinary meaning to refer to

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[17] Petitioners also argue (96-1654 Pet. Br. 16; 96-8837 Pet. Br. 29) that Sentencing Guidelines § 2D1.1(b)(1), which provides for a two-level enhancement if a firearm is "possessed" during a drug trafficking crime, is of relevance to the analysis. Congress's intent in using the term "carries" in Section 924(c) in 1968, however, cannot be illuminated by reference to a Guidelines provision first adopted by the Sentencing Commission decades later. In any event, the Guidelines provision addresses a far broader set of circumstances than does Section 924(c). In order to qualify for the enhancement, it need not be shown that the defendant either used a firearm or carried it (on the person or otherwise) and it need not be shown that it was "during and in relation to" a drug trafficking offense; the Guidelines enhancement applies if the defendant merely "possessed" the firearm, "unless it is clearly improbable that the weapon was connected with the offense." Guidelines § 2D1.1 comment., appl. note 3.

carrying both on the person and in a vehicle. There are at least 34 federal statutes that authorize various federal law enforcement and security agents "to carry firearms."[18] Among those covered by such authorizations are many categories of agents who can be expected to make extensive use of vehicles, such as

[18] These include 7 U.S.C. 2270 (agents employed by Inspector General of Department of Agriculture), 7 U.S.C. 2274 (Department of Agriculture quarantine agents), 8 U.S.C. 1357(a) (INS agents), 10 U.S.C. 1585 (civilian investigative officers of Department of Defense), 14 U.S.C. 95 (civilian special agents of the Coast Guard), 16 U.S.C. 1a-6(b) (National Park Service agents), 16 U.S.C. 559c(1) (Forest Service agents), 16 U.S.C. 831c-3(b)(2)(D) (TVA law enforcement agents), 16 U.S.C. 3375(b) (fish and wildlife agents), 18 U.S.C. 3050 (Bureau of Prisons agents), 18 U.S.C. 3052 (FBI agents), 18 U.S.C. 3053 (U.S. Marshals), 18 U.S.C. 3056(c)(1)(B) (Secret Service agents), 18 U.S.C. 3061(a)(4) (Postal Inspectors), 18 U.S.C. 3063(a)(1) (EPA agents), 18 U.S.C. 3603(9) (probation officers), 19 U.S.C. 1589a(1) (Customs Service agents), 21 U.S.C. 372(e)(1) (FDA investigators and inspectors), 21 U.S.C. 878(a)(1) (DEA agents), 22 U.S.C. 2709(a)(4) (Department of State and Foreign Service special agents), 25 U.S.C. 2803(1) (Bureau of Indian Affairs agents), 26 U.S.C. 7608(a)(1) (IRS and ATF agents), 28 U.S.C. 566(d) (U.S. Marshals Service), 38 U.S.C. 902(b)(3) (Department of Veterans Affairs police officers), 40 U.S.C. 13n(a)(5) (Marshal of the Supreme Court and Supreme Court Police), 40 U.S.C. 318d (GSA special police), 42 U.S.C. 2201(k) (Nuclear Regulatory Commission agents), 42 U.S.C. 2456 (NASA agents), 42 U.S.C. 7270a(1) (Strategic Petroleum Reserve guards), 43 U.S.C. 1733(c)(1) (local law enforcement agents under authority of Bureau of Land Management), 49 U.S.C. 44,903(d)(1) (air transportation security agents), 50 U.S.C. 403f(d) (CIA agents), 50 U.S.C. App. 2411(a)(3)(B)(iii) (export enforcement agents). See also Congressional Operations Appropriations Act, Pub. L. No. 104-53, Tit. III, § 313(a), 109 Stat. 538 (Sergeant at Arms of the House of Representatives).

agents of the FBI, 18 U.S.C. 3052, the Secret Service, 18 U.S.C. 3056(c)(1)(B), and the CIA, 50 U.S.C. 403f(d).

These statutes establish that Congress typically and regularly uses the phrase "carry firearms" to include a variety of means by which firearms may be carried. The obvious purpose of the authorization to carry firearms is to ensure that federal agents who require firearms to perform their functions may carry them on their persons, in vehicles, or by whatever means is appropriate, without regard to restrictive state or local gun control regulations. Yet, under petitioners' view, these authorization statutes would contain inexplicable gaps. Congress would have intended to authorize federal law enforcement agents to carry their guns on their persons, but not to authorize them to remove such guns upon entering a car and lay them on the seat, place them in a locked glove compartment, or put them in the trunk. That is not a plausible view of Congress's intent.[19]

[19] Other federal statutes similarly make clear that Congress typically uses similar phrases without restriction to refer to a variety of means by which weapons can be carried. For example, under 15 U.S.C. 5902(a), a crew member of an armored car company licensed by one State "to carry a weapon * * * shall be entitled to lawfully carry any weapon to which such license relates in any State while such crew member is acting in the service of such company." Under petitioners' view, Congress would thereby have required reciprocity among States only when the crew member carries a weapon on the person; if the crew member lays it down or otherwise stores it in the armored car, the statute would have no application. See also 18 U.S.C. 844(h)(2) (enhanced penalty for a person who "carries an explosive during the commission of any felony which may be prosecuted in a court of the United States"); 18 U.S.C. 967 (authority during wartime in which United States is neutral to forbid vessel to sail if vessel is reasonably believed "to carry

The authorization statutes also establish that no implicit "immediately accessible" qualification should be engrafted on to the statutory term "carry firearms." Congress could not have intended to authorize federal law enforcement agents to carry firearms only if the firearms may be viewed as being immediately accessible. To the contrary, there are circumstances in which it would be far safer for an agent to keep a firearm securely stowed in a locked glove compartment or trunk of a car than to keep it in a more immediately accessible location. Congress surely did not intend to withhold its authorization from such prudent practices.

2. Numerous state concealed weapons statutes similarly demonstrate that the word "carry," used in conjunction with a reference to firearms or other weapons, has a clear legal meaning, and that that meaning is entirely in accord with the ordinary meaning of the word "carry" to include carrying on the person and in a vehicle. Although it is difficult to summarize the wide variety of state statutes on the subject,[20] it appears that 24 States and the District of

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fuel, arms, ammunition, mem, supplies, dispatches, or information"). Of course, a great many statutes that use the word "carry" or its derivatives without mention of firearms are clearly intended to include carrying in vehicles. See, *e.g.*, 18 U.S.C. 32(a)(4) (prohibiting placing destructive device in proximity to "any cargo carried or intended to be carried on any * * * aircraft"); 18 U.S.C. 659 ("The carrying * * * of any [converted property] in interstate or foreign commerce * * * shall constitute a separate offense."); 18 U.S.C. 1694 (making it a crime for someone who has charge of a conveyance over which the mail "is regularly carried" to "carr[y], otherwise than in the mail, any letters or packets").

[20] Categorizing the state statutes is difficult in part because States often have overlapping prohibitions that impose different requirements on carrying different sorts of weapons in different circumstances. For example, in addition to the "concealed upon or about his person" statute cited in note 21, *infra*, Maryland also has a statute making it a crime to "wear, carry, or transport any handgun, whether concealed or open, upon or about his person" and to "wear, carry or knowingly transport any handgun, whether concealed or open, in any vehicle." Md. Ann. Code of 1957, art. 27, § 36B(b) (1996 & Supp. 1997). In addition, many States have statutes prohibiting the carrying of firearms in game preserves, etc. See, *e.g.*, S.C. Code Ann. § 16-23-20 (Law. Co-op. 1985) (unlawful "to take, attempt to take, or hunt" raccoons, opossums, or fox "when carrying on one's person or in one's vehicle a firearm"); Wash. Rev. Code Ann. § 77.16.110 (West 1996 & Supp. 1998) ("unlawful to carry firearms * * * upon a game reserve, except on public highways"). Those statutes are generally consistent with our view that the term "carry" is used without qualification to refer to carrying both in a vehicle or on the person, but we have not attempted an extensive categorization of such statutes. See also, *e.g.*, *Commonwealth* v. *Bigelow*, 378 A.2d 961 (Pa. Super. Ct. 1977) (prosecution for carrying in vehicle under statute prohibiting "carry[ing] a firearm * * * upon the public streets").

Columbia prohibit carrying a firearm (usually, a concealed firearm) by expressly using a phrase such as "on or about the person" or the like.[21] The use of the

[21] Ala. Code § 13A-11-50 (1994 & Supp. 1997) ("carries concealed about his person"); Colo. Rev. Stat. Ann. § 18-12-105 (Bradford 1986 & Supp. 1996) ("[c]arries a firearm concealed on or about his or her person"); Conn. Gen. Stat. Ann. § 53-206 (West 1994) ("carries upon his person"); Del. Code Ann. tit. 11, §§ 1442, 1443 (1995) ("carries * * * upon or about the person"); D.C. Code Ann. § 22-3204 (1996) ("carry * * * on or about their person"); Fla. Stat. Ann. § 790.01 (West 1992 & Supp. 1998) ("carry * * * on or about his person"); Ga. Code Ann. § 16-11-126 (1996 & Supp. 1997) ("carries about his or her person"); Idaho Code § 18-3302(1) and (14) (1997) (authorizing licenses to "carry a weapon concealed on his person" and prohibiting unlicensed carrying); Kan. Stat. Ann. § 21-4201(4)

qualifying "on the person" phrase in all of these statutes would be inexplicable under petitioners' view, since petitioners' essential claim is that the qualification "on the person" is implicit in each such statute. These statutes demonstrate that, where a legislature intends to limit a "carry firearms" statute to carrying on the person, the conventional mode of accom-

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(1995 & Supp. 1996) ("carrying * * * concealed on one's person"); Ky. Rev. Stat. Ann. § 527.020 (Michie 1990 & Supp. 1996) ("carries * * * on or about his person"); La. Rev. Stat. Ann. § 14:95(A)(1) (West 1986) ("intentional concealment * * * on one's person"); Me. Rev. Stat. Ann. tit. 25, § 2001 (West 1988) ("conceal about his person"); Md. Ann. Code of 1957, art. 27, § 36(a)(1) (1996) ("wear or carry * * * concealed upon or about his person"); Mo. Ann. Stat. § 571.030.1(1) (West 1995) ("carries concealed upon or about his person"); Mont. Code Ann. § 45-8-316 (1997) ("carries or bears concealed upon his person"); Neb. Rev. Stat. § 28-1202(1) (1995) ("carries * * * concealed on or about his or her person"); Nev. Rev. Ann. Stat. § 202.350.1(b) (Michie 1997) ("carry concealed upon his person"); N.M. Stat. Ann. § 30-7-1-2 (Michie 1994) ("carrying" means "having it on the person, or in close proximity thereto, so that the weapon is readily accessible for use"); N.C. Gen. Stat. § 14-269(a) (1993 & Supp. 1997) ("carry concealed about his person"); Ohio Rev. Code Ann. § 2923.12(A) (Anderson 1996) ("carry or have, concealed on his or her person or concealed ready at hand"); Okla. Stat. Ann. tit. 21, §§ 1272, 1290.4 (West 1983 & Supp. 1998) ("carry upon or about his person, or in a purse or other container belonging to the person"); S.C. Code Ann. § 16-23-20 (Law. Co-op. 1985) ("carry about the person"); Tex. Penal Code Ann. § 46.02(a) (West 1994) ("carries on or about his person"); Va. Code Ann. § 18.2-308 (1996) ("carries about his person"); W. Va. Code §§ 61-7-2(10), 61-7-3 (1997) (prohibiting "carr[ying] a concealed deadly weapon" and stating that "[a] deadly weapon is concealed when it is carried on or about the person" so that another person would not be on notice of its presence).

plishing that end is to say so specifically in the language of the statute.[2]

An additional 15 States prohibit carrying a firearm by using both an "on or about the person" qualification and an "in a vehicle" qualification.[3] Many of

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[2] Frequently States construe the statutory phrase "about the person" in a concealed weapons statute to impose an "immediate accessibility" requirement. See, *e.g.*, *State* v. *McNary*, 596 P.2d 417, 420 (Idaho 1979) (citing cases holding that carrying "upon or about [the] person" includes "not only when [the defendant] physically is carrying it in his clothing or in a handbag of some sort, but also when he goes about with the weapon in such close proximity to himself that it is readily accessible for prompt use"). The "immediate accessibility" requirement in any event is consistent with a major purpose of concealed weapons statutes, the "common thrust" of which is "to protect the public by preventing an individual from having on hand a deadly weapon of which the public is unaware, and which may be used in a sudden heat of passion." *State* v. *McAdams*, 714 P.2d 1236, 1238 (Wyo. 1986); see 79 Am. Jur. 2d *Weapons and Firearms* § 8, at 12 (1975). As we have argued above, the purpose of Section 924(c)—to deter those who would deal drugs from bringing their guns with them—would be disserved by adding that requirement.

[3] See Ariz. Rev. Stat. Ann. § 13-3102 (West 1989 & Supp. 1997) ("[c]arrying a deadly weapon without a permit * * * concealed on his person; or * * * concealed within immediate control of any person in or on a means of transportation"); Ark. Code Ann. 5-73-120 (Michie 1993 & Supp. 1995) ("A person commits the offense of carrying a weapon if he possesses a handgun * * * on or about his person, in a vehicle occupied by him, or otherwise readily available for use with a purpose to employ it as a weapon against a person"); Cal. Penal Code § 12,025 (West 1992 & Supp. 1998) ("[c]arries concealed within any vehicle * * * [or] * * * concealed upon his or her person"); Haw. Rev. Stat. Ann. §134-51 (Michie 1995 & Supp. 1997) ("carries * * * upon the person's self or within any vehicle used or occupied by the person"); 720 Ill. Comp. Stat.

these statutes specifically refer to carrying in a vehicle because they limit the prohibition somewhat differently in that setting—frequently including some kind of immediate accessibility requirement—than when the weapon is carried on the person. For example, the Arizona statute prohibits "[c]arrying a deadly weapon * * * concealed on his person; or * * * concealed within immediate control of any person in or on a means of transportation." Ariz. Rev. Stat. Ann. § 13-3102 (West 1989 & Supp. 1997). But these statutes too, like those that merely prohibit carrying "on the person," demonstrate the ordinary under-

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Ann. § 5/24-1(4) (West 1993) ("[c]arries or possesses in any vehicle or concealed on or about his person"); Ind. Code Ann. § 35-47-2-1 (Michie 1994) ("carry * * * in any vehicle or on or about his person"); Mich. Stat. Ann. § 28.424 (Law. Co-op. 1990) ("carry * * * on or about his or her person, or * * * in any vehicle"); Minn. Stat. Ann. § 624.714 (West 1987 & Supp. 1998) ("carries, holds or possesses * * * in a motor vehicle * * * or on or about the person's clothes or the person"); N.H. Stat. Ann. § 159:4 (Michie 1994 & Supp. 1997) ("carry * * * in any vehicle or concealed upon his person"); N.D. Cent. Code §§ 62.1-02-01, 62.1.02-02, 62.1-02-10 (1995 & Supp. 1997); Or. Rev. Stat. Ann. § 166.250 (1991 & Supp. 1996) ("carries * * * concealed upon the person * * * [or] concealed and readily accessible to the person within any vehicle which is under the person's control or direction"); 18 Pa. Cons. Stat. Ann. § 6106(a) (West 1983 & Supp. 1997) ("carries * * * in any vehicle * * * or * * * concealed on or about his person"); R.I. Gen Laws § 11-47-8 (1994 & Supp. 1997) ("carry * * * in any vehicle or conveyance or on or about his or her person"); S.D. Codified Laws § 22-14-9 (Michie 1988) ("carries * * * on or about his person * * * or * * * concealed in any vehicle operated by him"); Wash. Rev. Code Ann. § 9.41.050 (West 1988 & Supp. 1998) ("carry * * * concealed on his or her person * * * [or] in any vehicle").

standing of state legislatures that a weapon may be carried either on the person or in a vehicle.

Finally, five States appear simply to prohibit the carrying of concealed weapons, with no "on the person" or "in a vehicle" qualification.[24] Of those five States, three have construed their statutes to prohibit carrying in automobiles, as well as on the person.[25] The other two States appear never to have considered the question whether the term "carries" includes carrying in a vehicle.[26] No State—indeed, no

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[24] See Miss. Code Ann. § 97-37-1 (1994 & Supp. 1997) ("carries, concealed in whole or in part"); Tenn. Code Ann. § 39-17-1307(1) (1997) ("carries with the intent to go armed"); Utah Code Ann. § 76-10-504(1)(b) (1990 & Supp. 1997) ("carries"); Vt. Stat. Ann. tit. 13, § 4003 (1974) ("carries * * * with the intent or avowed purpose of injuring a fellow man"); Wyo. Stat. Ann. § 6-8-104(a) (Michie 1997) ("wears or carries").

[25] See *In the Interest of L.M., J.R., S.T. & D.S.*, 600 So. 2d 967, 970-971 (Miss. 1992) (weapon secured under the hood of a car was "carried" under state concealed weapons provision); Miss. Code. Ann. § 97-37-2 (1994 & Supp. 1997) (recently enacted exclusion to state concealed weapons statute providing that "[i]t shall not be a violation * * * for any person * * * to carry a firearm or deadly weapon concealed in whole or in part * * * within any motor vehicle"); *State* v. *Williams*, 636 P.2d 1092, 1094 (Utah 1981) (stating that "'carrying' necessarily must include more than when the weapon is in physical contact with the body" and that a defendant "will be deemed to be 'carrying' [a] weapon" if it "is shown to be under [the] defendant's control and within his immediate, easy or ready access"); *State* v. *Warr*, 604 S.W. 2d 66, 68 (Tenn. Ct. App. 1980) (pistol under seat held to be carried under state concealed weapons statute).

[26] There appear to be no reported cases of any kind applying the Vermont or Wyoming statutes. Cf. *State* v. *McAdams*, 714 P.2d 1236, 1238 (Wyo. 1986) (rejecting state constitutional challenge to state concealed weapons statute).

court anywhere, to our knowledge—has adopted petitioners' argument that the term "carry," when not limited by a term such as "on the person," does not apply to firearms carried in an automobile.[27]

D. Nothing In *Bailey* Supports Or Compels The Conclusion That "Carrying" A Firearm In A Vehicle Requires Immediate Accessibility.

Petitioners argue that their proposal to engraft an "on the person" element onto Section 924(c) is supported by this Court's decision in *Bailey*. According to petitioners, "*Bailey* established that 'use' of a firearm under section 924(c)(1) requires a narrow definition—'active employment' of the weapon—not a broad definition, such as merely placing the gun 'at the ready,' as the government had argued." 96-1654 Pet. Br. 15. Petitioners argue that, "in order to preserve the parallel structure of the statute, the term 'carries' in section 924(c)(1) should also be construed narrowly." *Ibid.*

This Court, however, did not construe the term "use" to mean "active use" in *Bailey* because of some overarching principle of narrow construction that is unique to Section 924(c). Indeed, any such principle

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[27] The concealed weapons statutes in six States do not use the word "carry." See Alaska Stat. § 11.61.220(a)(1) (Michie 1996) ("possesses a deadly weapon * * * that is concealed on the person"); Iowa Code Ann. § 724.4 (West 1993) ("goes armed with * * * on or about the person, or * * * carries or transports in a vehicle"); Mass. Ann. Laws ch. 269, § 10(a) (Law. Co-op. 1992) ("knowingly has in his possession; or knowingly has under his control in a vehicle"); N.J. Stat. Ann. § 2C:39-5 (West 1989) ("knowingly has in his possession"); N.Y. Penal Law §§ 265.01-265.03 (West 1989) ("possesses" or "knowingly has in his possession"); Wis. Stat. Ann. § 941.23 (West 1996) ("goes armed with").

would be inconsistent with this Court's decisions in *Smith* and in *Deal* v. *United States*, 508 U.S. 129 (1993), in both of which the Court rejected a narrower construction of a key term in Section 924(c) in favor of a broader one. What *Bailey*, *Smith*, and *Deal* do stand for is the principle that the words Congress used in Section 924(c), like the words it has used in other statutes, should be construed in their ordinary meanings, informed by the statute's history and context. As we have argued above, all of those factors point decisively toward construing the word "carry" as used in Section 924(c) in its ordinary meaning, to include both carrying in a vehicle and carrying on the person.

E. Because The Ordinary Tools Of Statutory Construction Make The Meaning Of The Term "Carry" In Section 924(c) Clear, The Rule Of Lenity Has No Application In This Case

Petitioners contend (96-1654 Pet. Br. 19-20) that engrafting an "on the person" element to Section 924(c) is "*at least* * * * reasonable," that "the statute is therefore *at least* ambiguous," and that the rule of lenity therefore requires this Court to adopt their construction. See also 96-8837 Pet. Br. 39-42.

"The mere possibility of articulating a narrow construction [for Section 924(c)(1)], however, does not by itself make the rule of lenity applicable." *Smith*, 508 U.S. at 239. Nor is a statute "ambiguous for purposes of lenity merely because there is a division of judicial authority over its proper construction." *Reno* v. *Koray*, 515 U.S. 50, 64-65 (1995) (internal quotation marks omitted). As the Court explained in *Moskal* v. *United States*, 498 U.S. 103, 108 (1990), "[b]ecause the meaning of language is inherently contextual, [the Court has] declined to deem a statute

'ambiguous' for purposes of lenity merely because it was *possible* to articulate a construction more narrow than that urged by the government." Instead, the rule of lenity comes into play only when, after "[a]pplying well-established principles of statutory construction," *Gozlon-Peretz* v. *United States*, 498 U.S. 395, 410 (1991), a court "can make no more than a guess as to what Congress intended." *Reno*, 515 U.S. at 65 (internal quotation marks omitted); see also *Smith*, 508 U.S. at 239, quoting *United States* v. *Bass*, 404 U.S. 336, 347 (1971) (the "rule [of lenity] is reserved for cases where, [a]fter seiz[ing] every thing from which aid can be derived, the Court is left with an ambiguous statute") (internal quotation marks omitted); *Chapman* v. *United States*, 500 U.S. 453, 463 (1991) (Lenity applies only where there remains a "grievous ambiguity or uncertainty in the language and structure of the Act.") (internal quotation marks omitted).

This is not such a case. To paraphrase this Court's decision in *Smith*, the "common usage and dictionary definitions of the term[] '[carries] . . . a firearm,'" *Smith*, 508 U.S. at 240, embrace any carrying of a firearm that facilitates a drug trafficking offense, regardless of whether the carrying is done on the person or in a vehicle or some other way. Moreover, Congress's purpose was to impose heightened sanctions when a defendant employs the "dangerous combination" of firearms and narcotics trafficking. *Ibid.* That purpose is inconsistent with an interpretation of the statute that singles out a particular mode of carrying (on the person) while leaving others unpunished.

F. Under A Proper Interpretation Of Section 924(c), Petitioners Carried Firearms

1. In No. 96-1654, petitioner Muscarello was convicted on his guilty plea to violating Section 924(c). At the plea hearing, the government submitted a factual statement signed by petitioner. The statement recited that petitioner kept a loaded firearm in the locked glove compartment of his truck for protection in relation to his drug dealing offense. Although the district court later discounted Muscarello's agreement to the "in relation to" element of the offense, see 96-1654 Pet. App. 10a-11a, the court of appeals reversed that decision by the district court, 96-1654 Pet. App. 5a. Petitioner did not present any question relating to that holding of the court of appeals in his petition for certiorari. Accordingly, the only remaining issue regarding petitioner's conviction concerns whether the loaded firearm found in the locked glove compartment of his truck can be said to have been carried for purposes of Section 924(c). If this Court agrees with us that an individual carries a gun in a vehicle under Section 924(c) by transporting it there, then the Fifth Circuit's judgment in this case should be affirmed.

Muscarello could obtain outright reversal only if this Court holds that the term "carries" in Section 924(c) requires proof that the firearm was carried on the person of the defendant—a holding adopted by no court of appeals. If, in contrast, this Court holds that a firearm may be carried in a vehicle under Section 924(c), but only if it is immediately accessible, then the case should be remanded to the Fifth Circuit. Because Muscarello's conviction was entered on his guilty plea, there has been no factual development in

this case on how accessible the firearm in the glove compartment was. Ordinarily, a locked glove compartment would provide little barrier to a defendant who wanted ready access to a firearm.[28] Accordingly, the case would have to be remanded to determine whether the firearm was immediately accessible.

2. In No. 96-8837, petitioners admitted that they purchased several guns on the day of a planned drug transaction so that they could steal the cocaine from the sellers. They also admitted that they carried the guns to the trunk of a car and put them in the trunk, before entering the car and driving to the scene of the drug transaction. See 96-8837 J.A. 13, 14-16.[29] Petitioners also pleaded guilty to attempting to possess

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[28] See, *e.g.*, *United States* v. *Holifield*, 956 F.2d 665, 668-669 (7th Cir. 1992) ("it would have taken only a few seconds for [the defendants] to remove the keys from the ignition and unlock" the compartment); *Ensor* v. *State*, 403 So. 2d 349, 354 (Fla. 1981) ("on or about the person" in concealed weapons statute includes "the interior of an automobile and the vehicle's glove compartment, whether or not locked"); *State* v. *Walton*, 429 N.W.2d 133 (Iowa 1988) (revolver in locked glove compartment is readily accessible).

[29] Although Cleveland plainly admitted to carrying the firearms in a bag to the car, Gray-Santana appears to have directly admitted only that, earlier on the day of the planned drug transaction, he purchased one of the guns that were ultimately found in the car in order to facilitate the planned theft of the drugs. See 96-8837 J.A. 26, 27. Of course it could be readily inferred that, after purchasing the gun, he carried it at least to the point where he could give it to Cleveland to put in the car. Nonetheless, even if Gray-Santana did not himself physically carry the gun on his person at any time, he would be guilty of violating Section 924(c) as an aider and abettor of Cleveland. See 18 U.S.C. 2.

cocaine with intent to distribute it, in violation of 21 U.S.C. 846. 96-8837 J.A. 16, 28.

Under any possible construction of the word "carry" in Section 924(c), petitioners' admissions regarding the purchase and carrying of the guns to the automobile—even aside from their carrying of the guns in the automobile—are sufficient to constitute an admission that they carried the firearms during and in relation to the drug trafficking offense for which they were convicted. Petitioners' convictions therefore should be affirmed.

We acknowledge that we did not argue in our opposition to the petition for certiorari in No. 96-8837 that the Section 924(c) convictions of petitioners Cleveland and Gray-Santana would have to be affirmed regardless of this Court's ruling in their case. See Sup. Ct. R. 15.2. Nonetheless, upon a closer examination of the record, it has become apparent that petitioners' convictions could not be reversed under any interpretation of Section 924(c) presented by the parties in these cases. Accordingly, this Court may wish to dismiss the writ of certiorari in No. 96-8837 as improvidently granted.[30]

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[30] With respect to petitioner Cleveland, this case arises from his motion under 28 U.S.C. 2255 in district court. See p.8 & note 1, *supra*. With respect to petitioner Gray-Santana, it has never been finally determined whether this case has proceeded under Section 2255 or instead whether it should be viewed as having arisen from a motion to withdraw a guilty plea under Rule 32(e) or as a motion to correct sentence under Federal Rule of Criminal Procedure 35(c). See note 1, *supra*. Because it rejected petitioners' claims on their merits, the court of appeals "d[id] not address any potential jurisdictional question stemming from Cleveland's § 2255 appeal." 96-8837 J.A. 104. Insofar as No. 96-8837 arises from the Section 2255 motions of

CONCLUSION

The judgments of the courts of appeals should be affirmed.

Respectfully submitted.

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one or both petitioners, the appropriate disposition of the case may be affected by this Court's decision in *Bousley* v. *United States*, No. 96-8516. That case involves questions that arise in an analogous setting under Section 2255 regarding whether a decision that would narrow the substantive scope of a federal criminal statute has retroactive application in a case brought under Section 2255, whether a guilty plea bars a defendant's claim that the acts he committed are not a federal crime, and whether a defendant may make such a claim notwithstanding the failure to raise it on direct appeal.

APPENDIX

Section 924(c) of Title 18 of the United States Code provides in relevant part:

(1) Whoever, during and in relation to any crime of violence or drug trafficking crime (including a crime of violence or drug trafficking crime which provides for an enhanced punishment if committed by the use of a deadly or dangerous weapon or device) for which he may be prosecuted in a court of the United States, uses or carries a firearm, shall, in addition to the punishment provided for such crime of violence or drug trafficking crime, be sentenced to imprisonment for five years, and if the firearm is a short-barreled rifle, short-barreled shotgun, or semiautomatic assault weapon, to imprisonment for ten years, and if the firearm is a machinegun, or a destructive device, or is equipped with a firearm silencer or firearm muffler, to imprisonment for thirty years. In the case of his second or subsequent conviction under this subsection, such person shall be sentenced to imprisonment for twenty years, and if the firearm is a machinegun, or a destructive device, or is equipped with a firearm silencer or firearm muffler, to life imprisonment without release. Notwithstanding any other provision of law, the court shall not place on probation or suspend the sentence of any person convicted of a violation of this subsection, nor shall the term of imprisonment imposed under this subsection run concurrently with any other term of imprisonment including that imposed for the crime of violence or drug trafficking crime in which the firearm was used or carried.

(2) For purposes of this subsection, the term "drug trafficking crime" means any felony punishable under the Controlled Substances Act (21 U.S.C. 801 et seq.), the Controlled Substances Import and Export Act (21 U.S.C. 951 et seq.), or the Maritime Drug Law Enforcement Act (46 U.S.C. App. 1901 et seq.).

(3) For purposes of this subsection the term "crime of violence" means an offense that is a felony and—

(A) has as an element the use, attempted use, or threatened use of physical force against the person or property of another, or

(B) that by its nature, involves a substantial risk that physical force against the person or property of another may be used in the course of committing the offense.

No. 96-8837

In The

Supreme Court of the United States

October Term, 1997

DONALD E. CLEVELAND
ENRIQUE GRAY-SANTANA,

Petitioners,

v.

UNITED STATES OF AMERICA,

Respondent.

On Writ Of Certiorari
To The United States Court Of Appeals
For The First Circuit

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A. The Dictionaries Show The Ordinary Meaning Of "Carry" In The Phrase "Carry A Firearm" Is "Bear A Firearm" And Not "Transport A Firearm."

In their opening brief, petitioners noted that "carry" can mean either "transport" or "bear or support."[1] (Pet. Br. 9-18.) Petitioners argued that the context provided by the phrase "carry a firearm" in § 924(c) served to disambiguate "carry" and to make clear that it does not mean "transport a firearm" but rather "bear a firearm." *Id.*

The government responds to petitioners' argument by ignoring it, choosing instead to respond to a position that petitioners did not take. The government asserts that petitioners seek to "limit" the meaning of "carry a firearm" to "transport on the person" while the government

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[1] The government repeatedly refers to "transport" as the "first" or "preferred" definition of "carry," and suggests that early numerical listing of that meaning demonstrates preference. (Govt. Br. 14 n.4.) This suggestion is spurious. As one dictionary sensibly notes, "[a]ny effort to arrange each entry so that the prevailing current meaning is given first is doomed to failure, since for most words there are a number of senses, on different levels and in different fields, that have equal currency." *Webster's New Universal Unabridged Dictionary*, Introduction at v (2d ed. 1979).

espouses the meaning "transport" whether on the person or in a vehicle. What petitioners argued, however, was that the ordinary meaning of "carry a firearm" requires no movement but only location on the person. Contrary to the government's position, "carry a firearm" is not synonymous with "transport a firearm." By ignoring the context provided by the phrase "carry a firearm" and focusing on the bare word "carry," the government erects a straw position behind which to obscure the clear, ordinary meaning of the phrase "carry a firearm" used in § 924(c).

Petitioners do not take the position the government ascribes to them, "that the term 'carry' may refer to the *transportation* of an object in a pocket or otherwise on one's person." (Govt. Br. 14-15.) Rather, petitioners note that the ordinary meaning of the phrase "carry a firearm" is, as given in *Black's Law Dictionary*: "To *have or bear upon or about one's person*, as a watch *or a weapon; locomotion not being essential.*" *Black's Law Dictionary* 269 (rev. 4th ed. 1968) (emphasis added); *Black's Law Dictionary* 214 (6th ed. 1990) (same). The government quotes this definition (Govt. Br. 16) but avoids noticing its significance to the issue at hand.[2]

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[2] As to the more specific definition of "carry firearms" in *Black's*, "To wear, bear, or carry them upon the person or in the clothing or in a pocket, for the purpose of use, or for the purpose of being armed and ready for offensive or defensive action in case of a conflict with another person," the government can only claim that Congress did not intend this to be the "exclusive" definition of "carry firearms." (Govt. Br. 16-17.) Petitioners address this issue in their opening brief. (Pet. Br. 37-38 & 14 n.9.) The government also devotes two pages to exegesis of cases

Black's, like all other dictionaries, gives multiple meanings for the word "carry." The existence of multiple meanings implies an ambiguity. However, as *Black's* and other dictionaries note (but the government ignores), the word "carry" takes one of its ordinary meanings, "bear," when used in the phrase "carry a firearm." The disambiguating context provided by the use of the phrase "carry a firearm" in § 924(c) bespeaks Congress' intent to proscribe the bearing of firearms on the person rather than the transporting of firearms.

B. The Government's Efforts To Distinguish "Carry" From "Transport" Fail.

In *United States v. Foster*, 133 F.3d 704 (9th Cir. 1998) (*en banc*) the Ninth Circuit held that "carry" in "carry a firearm" means "to hold an object while moving from one place to another." Although petitioners do not espouse the Ninth Circuit's position, because it does not comport with the ordinary meaning of the phrase "carry a firearm," petitioners would nevertheless prevail under this

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cited in the entry for "carry firearms" in the 1968 and 1933 editions of *Black's Law Dictionary* in an attempt to nullify the definition given in both of those editions, as well as all subsequent editions. The effort is wasted. The cases were illustrative, not definitive (that is the job of the definition), and the definition is in accord with the ordinary meaning given in all other dictionaries. There is no need to construe the definition and the effort is far afield of the task at hand, which is to construe § 924(c).

formulation, which has been adopted by the Second and Sixth Circuits as well.[3]

In attempting to rescue its peculiar construction of "carry a firearm," the government asserts that its definition maintains a difference between "carry" and "transport." "Carry," the government says, "emphasizes personal agency" while "'transport' is most often used when the emphasis is on bare movement, bulk goods and common carriers." (Govt. Br. 23.) Nowhere in its discussion of "paradigmatic cases" does the government explain how its definition of "carry a firearm" differs from "transport a firearm." To the contrary, the government's brief hides an implicit concession that the terms "carry" and "transport," as the government defines them, cover exactly the same behavior. If one "carries a firearm" by transporting it in a vehicle, one violates § 924(c) by

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[3] The government attacks this "immediate accessibility" position, asserting that "[n]o definition of 'carry' in any dictionary supports the proposition that the word refers only to items – whether firearms or otherwise – that are immediately accessible." (Govt. Br. 19.) This is plain wrong. *See, e.g., Webster's New Universal Unabridged Dictionary* at 277, entry 14 (2d ed. 1979) ("To hold or support (something) while moving; as, she is carrying the child in her arms.");*Webster's II New College Dictionary* at 170, entry 4 (1995) ("To hold or bear while moving.") These definitions incorporate both movement and proximity. Petitioners have noted that the "immediate accessibility" definition of "carry firearms" has problems not presented by the ordinary meaning "bear on the person," (*see* Pet. Br. 45-47 & 49 n.50), but one problem it avoids, which the government does not in its formulation, is conflation of "carry" with "transport," two concepts which Congress kept distinct, as shown by its use of "transport" elsewhere in the statutory scheme. (*See* Pet. Br. 19-22.)

transporting the firearm, whether in the locked trunk of a car, in the locked luggage compartments of an interstate bus, in a freight car on a train, or in the cargo hold of an ocean liner or a jumbo jet. These may not be, in the government's view, "paradigm" cases under § 924(c), but they are unavoidably covered by the government's definition. As petitioners have shown, Congress used "transport" when it meant to, and must have intended "carry" to mean something distinct, not merely an alternative formulation of "transport" with an ineffably "different emphasis."

C. The Legislative History Does Not Support The Government's Broad Construction Of "Carry A Firearm" In § 924(c), Nor Does It Undercut Petitioner's Argument That The Statutory Scheme Supports Reading "Carry A Firearm" As Having Its Ordinary Meaning "Bear On The Person."

The government seeks support for its strained construction of § 924(c) in Representative Poff's comment, advocating for his amendment (which ultimately became § 924(c)), that "[t]he effect of a minimum mandatory sentence in this case is to persuade the man who is tempted to commit a Federal felony to leave his gun at home." (Govt. Br. 25.) The government would draw from the Congressman's oratorical flourish the conclusion that the § 924(c) prohibition on "carrying a firearm" punishes all transport of a firearm. This notion falls apart when one considers that § 924(c) applies to federal felonies

committed at home, where transportation does not come into play.[4]

The government also unsuccessfully attacks petitioners' argument that the penalty structure of § 924 supports their position. First, the government asserts that the harsh penalty for carrying merely establishes Congress' intent to severely punish transporting a firearm. (Govt. Br. 30.) This ignores petitioners' point, which is that transportation of firearms is punished elsewhere in § 924, and less severely than the punishment provided under § 924(c), reflecting the less immediate threat posed by transportation of a firearm as opposed to having a firearm on one's person. (Pet. Br. 28.)

The government next argues that the penalties for carrying a firearm were significantly less harsh when § 924(c) was first enacted, vitiating petitioners' argument based on the gradation of punishments. (Govt. Br. 30.) When it was first enacted, § 924(c) provided for a mandatory sentence, a considerably harsher penalty than those provided in the companion prohibitions of § 924, including the penalty for transporting a firearm with intent to commit a felony.[5] That a one year mandatory minimum

[4] Representative Poff would certainly have been surprised at the suggestion that a defendant who consummated a drug deal in his apartment with a gun in his pocket was exempt from prosecution because his gun was "at home." As petitioners pointed out, several courts of appeals have expressly found § 924(c) liability under such circumstances. (Pet. Br. 13 n.7.)

[5] Although a much simpler statute as originally enacted in 1968, the gradations of punishments were in place even then. Section 924(a) in 1968 provided for a catch-all maximum penalty of five years for violation of any provision of Chapter 44;

sentence was, at the time, a harsh sentence is made clear by considering that drug felonies charged under 21 U.S.C. § 841, which now carry significant mandatory penalties tied to the quantities of drugs involved, did not carry mandatory minimum penalties at that time. As is the case now, when § 924(c) was originally passed it formed a particularly harsh part of a gradated statutory scheme. Petitioners' argument was valid in 1968 and remains valid today.

D. Statutes Authorizing Federal Officers To Carry Weapons Do Not Support The Government's Construction Of § 924(c).

The government claims that federal statutes outside Chapter 44 authorizing various federal officers to carry firearms support its argument that "carry firearms" means "transport firearms." (Govt. Br. 32 nn.18, 19.) The authorization to carry firearms, the government argues, must encompass transporting firearms in vehicles, because many of these officers make extensive use of automobiles in the course of their duties and must be authorized not only to have the firearm on their person but to place it beside them in their car, or to place it in the

§ 924(b) provided for a maximum penalty of ten years for shipping, transporting or receiving a firearm with intent to commit a felony; and § 924(c) provided for a mandatory minimum one year penalty with a maximum of ten years for a first offense and a mandatory minimum two year penalty with a maximum twenty year penalty for a second or subsequent offense.

trunk or glove compartment as well. Congress, the government continues, could not have intended to limit its authorization only to bearing a weapon on the person, and thus its use of the phrase "carry firearms" in these statutes must mean "transport firearms," and if it does Congress must similarly have used the phrase "carry firearms" in § 924(c).

This argument ignores a fundamental difference between the cited statutes and § 924(c). These statutes *authorize* conduct rather than *criminalizing* it. The principle of strict construction of penal statutes has no bearing on the construction of these non-penal statutes, and indeed they, unlike § 924(c), are properly construed as broadly as possible given their apparent purpose to aid federal officers in the performance of their official duties.[6]

The construction of these statutes thus sheds no light on § 924(c). As the Court noted in *Bailey v. United States*, 116 S. Ct. 501 (1995) the language of the statute is to be

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[6] *See United States v. 14,876 Pieces of Puerto Rico Lottery Tickets*, 791 F. Supp. 345, 347-48 (D. Puerto Rico 1992) (rejecting argument for narrow definition of "lottery ticket" as used in forfeiture statute, 19 U.S.C. § 1305(a), based on narrow definition of "lottery ticket" as used in penal statute, 18 U.S.C. §§ 1301, 1302; statutes not to be construed *in pari materia* that have distinct purposes); *Common Cause v. Federal Election Commission*, 842 F.2d 436, 441 (D.C. Cir. 1988) (rejecting argument that "name" should be construed identically in two statutory provisions: "the assertion that these two sections must be similarly construed ignores the different purposes served by each section and the dissimilar campaign arrangements to which they apply.")

construed in light of its purpose, and the radical difference in purpose between these statutes and § 924(c) defeats any attempt to construe them *in pari materia*.

E. State Laws On Carrying Provide No Support For The Government's Broad Reading Of § 924(c).

The government argues that the myriad of state statutes dealing with firearms "demonstrate that the word 'carry,' used in conjunction with a reference to firearms or other weapons, has a clear legal meaning" that accords with the government's position on the ordinary meaning of "carry a firearm." (Govt. Br. 34.) These statutes, which the government notes are difficult to categorize due to "overlapping prohibitions that impose different requirements on carrying different sorts of weapons in different circumstances," *id.* at n.20, provide no such "clear legal meaning."

The government does not, and could not, argue that § 924(c) is to be construed *in pari materia* with these statutes. Nothing suggests that Congress modeled § 924(c) on these various state statutes, or on any particular state's statutory scheme. Section 924(c), unlike the state statutes the government appeals to, addresses the use or carrying of a firearm in connection with the commission of a crime. Resort to state statutes that use the phrase "carry a firearm" is thus of no help in construing the language of § 924(c), except insofar as these statutes might illustrate the ordinary meaning of the phrase "carry a firearm" that Congress used. The welter of terms and qualifiers used by the states, touched on by the government's brief survey, makes it virtually impossible for the government to find aid in these statutes for its supposed meaning.

F. The Mandate Of Statutory Construction Set Forth In *Bailey* Compels The Conclusion That "Carrying A Firearm" Must Be Read With Its Ordinary Meaning In § 924(c).

Some forty pages into its brief, the government acknowledges the existence of the Court's *Bailey* decision and the principle it stands for, that "the words Congress used in § 924(c), like the words it has used in other statutes, should be construed in their ordinary meanings, informed by the statute's history and context." (Govt. Br. 40.) Unfortunately the government utterly ignores this principle in the preceding 39 pages of its brief. The government ignores the context in which Congress used the verb "carry," *viz.*, "carry a firearm;" ignores the ordinary meaning of this phrase found in every English language dictionary; and minimizes the force of the broader context of the statutory scheme of which § 924(c) is a part. The Court's decision in *Bailey* and the factors it employed to construe the "use" prong of § 924(c), contrary to the government's assertion, point decisively toward construing the *phrase* "carry a firearm" used in § 924(c) in its ordinary meaning, to bear a firearm upon the person.

II. THE GOVERNMENT'S ARGUMENT THAT PETITIONERS VIOLATED § 924(c) BY PLACING FIREARMS IN THE TRUNK OF THE VEHICLE IS PROCEDURALLY AND SUBSTANTIVELY INVALID.

Recognizing that petitioners prevail whether "carry a firearm" means either "on the person" or "immediately accessible," the government in its brief raises for the first time a theory of liability that was never addressed below:

that petitioners violated § 924(c) by putting the guns in the trunk of the vehicle earlier in the day of their arrest. On the basis of this new theory the government argues that petitioners' convictions should be affirmed and suggests that the writ of certiorari may be dismissed as improvidently granted. (Govt. Br. 44-45.)[7] The

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[7] In a footnote the government suggests for the first time that petitioners may be procedurally barred from raising the § 924(c) issue if the case comes to the Court on a 28 U.S.C. § 2255 motion, depending on the outcome of a case now before the Court, *Bousley v. United States*, Supreme Court No. 96-8516. (Govt. Br. 45 n.30.) *Bousley*, which arose on a § 2255 motion filed years after the judgment became final after direct appeal, has no bearing on this case, in which there is still no final judgment. The government noted this distinction, and its significance, in its brief to the Court in *Bousley*: "If *Bailey* had been handed down while petitioner's case was pending on direct review, petitioner could, *without doubt*, have claimed the benefit of the construction of Section 924(c) announced in *Bailey*. *See Griffith v. Kentucky*, 479 U.S. 314 (1987); *Penry v. Lynaugh*, 492 U.S. 302, 314 (1989)." (Brief for the United States, *Bousley v. United States*, 17) (emphasis added). Under *Griffith* the merits of petitioners' § 924(c) issue are properly before the Court. In any event § 2255 is not the vehicle by which the issue is here. Gray-Santana raised the issue by motion on December 8, 1995, J.A. 41-42, and judgment entered May 26, 1996, J.A. 73. Although Cleveland cited § 2255 in his post-judgment motion, the trial court considered it as part of the criminal case rather than as a collateral matter. J.A. 61. The First Circuit consolidated this issue with petitioners' other issues, and decided it on the merits. Consideration of this issue on direct appeal is permitted under Fed. R. Crim. P. 32(e), which allows a motion to withdraw a guilty plea after sentence *either* under § 2255 *or* on direct appeal. Additionally, the government conceded this point in its brief below: "[the First Circuit]'s ability to consider the defendant's claims even for the first time on direct appeal renders unnecessary an extended inquiry into those procedural

government's new argument is not properly before the Court. Moreover, this argument is substantively invalid, since petitioners' activities prior to, and including, putting the guns in the trunk constituted "mere preparation," not an attempt to possess cocaine with intent to distribute. Consequently, putting the guns in the trunk did not constitute carrying "during" the predicate offense under § 924(c).

A. The Government Is Precluded From Raising In Its Merits Brief A New Theory As To The Basis For Petitioners' Criminal Liability Under § 924(c).

The government raises, for the first time, a new theory of liability for petitioners – that they "carried" the guns to their car. (Govt. Br. 45.) This new theory seeks to avoid the plainly stated qustion presented, "whether a defendant 'carries' a firearm . . . if [he] has it with him in . . . the trunk of a vehicle." (Govt. Br. I.) This theory was not raised by the government in the courts below or addressed by those courts.[8]

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complexities." (Brief for Appellee 41, *United States v. Cleveland*, 106 F.3d 1056 (1st Cir. 1997) (No. 96-1043, 96-1659).) The government has thus waived any claim that petitioners are procedurally barred on the merits. On all counts the Court's decision in *Bousley* does not affect this case.

[8] The government's argument to the First Circuit that petitioners "carried a firearm" was totally focused on accessibility and the question of whether inaccessible guns are carried in a vehicle (Brief for Appellee 43-52, *United States v. Cleveland*, 106 F.3d 1056 (1st Cir. 1997) (No. 96-1043, 96-1659).) The government concluded, "[w]here Cleveland and Gray

As the government acknowledges in its brief (Govt. Br. 45), it had an obligation "to point out in the brief in opposition, and not later, any perceived misstatement made in the petition." Sup. Ct. R. 15.2. Furthermore,

> Any objection to consideration of a question based on what occurred in the proceedings below, if the objection does not go to jurisdiction, may be deemed waived unless called to the Court's attention in the brief in opposition.

Id. The Court has strictly enforced this rule by exercising its discretion to deem waived arguments which respondents fail to raise in the courts below and in their oppositions to certiorari. *See, e.g., City of Canton, Ohio v. Harris*, 489 U.S. 378, 383 (1989); *Gardebring v. Jenkins*, 485 U.S. 415, 425 n.12 (1988); *City of St. Louis v. Prapnotnik*, 485 U.S. 112, 120 (1988); *Oklahoma City v. Tuttle*, 471 U.S. 808 (1985). The Court has precluded respondents from raising in their briefs new factual premises which were not raised in their oppositions to certiorari or in the courts below. *See, e.g., Eastman Kodak v. Image Technical Services*, 504 U.S. 451, 465 n.10 (1992); *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, 1020 n.9 (1992).

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acknowledge transporting three loaded firearms in the trunk of their car for the express purpose of using them to rob their would-be suppliers at an imminent drug exchange, there can, as the district court found, be no error in allowing their pleas to stand." *Id.* at 51-52. Nor did the First Circuit consider anything outside of the time period when the guns were in the trunk while upholding the conviction. J.A. 103-114. The district court also clearly based petitioners' convictions on its finding that petitioners "carried the guns in the Mazda." J.A. 55, 70.

The case at bar presents "no unusual circumstances" which would justify permitting the government to raise a new factual theory of liability at this late stage. *See Berkemar v. McCarthy*, 468 U.S. 420, 443 n.38 (1984).[9] Therefore, the Court should decide the question under the same factual assumptions as did the Court of Appeals.

B. Petitioners Did Not Violate § 924(c) By Placing Firearms In The Trunk "During" An Attempt To Possess Cocaine With Intent To Distribute.

There is good reason why government's newfound theory – that petitioners' convictions under § 924(c) can be predicated on their carrying the guns to the trunk of the vehicle – was neither raised by the government in the courts below nor addressed by those courts: under no conceivable stretch of the well-established case law on the subject could placing the guns in the trunk be deemed to have occurred *during* commission of an attempt to possess cocaine with intent to distribute.[10]

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[9] For the Court to affirm petitioners' convictions under § 924(c) on the basis of a factual theory which the district court did not consider would violate the Court's ruling in *Cole v. Arkansas*, 333 U.S. 196, 202 (1948), that "to conform to due process of law, petitioners [are] entitled to have the validity of their convictions appraised on consideration of the case as it was tried and as the issues were determined in the trial court."

[10] In Counts Four and Five petitioners Cleveland and Gray-Santana, respectively, were charged with using and carrying three firearms "during and in relation to the drug trafficking crime alleged in Count Three of this Indictment, to wit: attempt to possess cocaine with intent to distribute, in violation of 21 U.S.C. § 846." J.A. 5, 6.

Federal law provides no statutory definition of attempt. *E.g, United States v. Neal*, 78 F.3d 901, 906 (4th Cir. 1996), *cert. denied*, 117 S. Ct. 152 (1996). However, there is "fundamental agreement" in the case law that conduct constitutes a criminal attempt only if (1) the defendant "act[ed] with the kind of culpability otherwise required for the commission of the crime which he is charged with attempting"; and (2) the defendant "engaged in conduct which constitutes a substantial step toward commission of the crime." *United States v. Mandujano*, 499 F.2d 370 (5th Cir. 1974), *cert. denied*, 419 U.S. 1114 (1975). "A substantial step must be conduct strongly corroborative of the firmness of the defendant's criminal intent." *Id.* It is something more than "mere preparation," but rather is "an appreciable fragment of a crime, an action of such substantiality that, unless frustrated, the crime would have occurred." *United States v. Nelson*, 66 F.3d 1036, 1042 (9th Cir. 1995) (citation omitted). A substantial step has been defined as an action or actions "adapted to, approximating, and which in the ordinary and likely course of things will result in, the commission of the particular crime." *United States v. Manley*, 632 F.2d 978, 988 (2d Cir. 1980), *cert. denied sub nom. Williams v. United States*, 449 U.S. 1112 (1981). Hence, "[l]iability for attempt attaches if the defendant's actions have proceeded to the point where, if not interrupted, [they] would culminate in the commission of the underlying crime." *United States v. Polk*, 118 F.3d 286, 291 (5th Cir.), *cert. denied*, 118 S. Ct. 456 (1997).

Even where it is clear that a defendant intended to commit the underlying crime, attempt is not proven until his or her actions "cross the line between preparation and

attempt by unequivocally demonstrating that the crime will take place unless interrupted by independent circumstances." *Nelson*, 66 F.3d at 1042 (internal quotation marks omitted). It is this element that distinguishes attempt from conspiracy. *Id.* at 1044 ("the overt act required as an element [of conspiracy] need not have as immediate a connection to the intended crime as the substantial step required for an attempt") (citation omitted).

There being "no definite line" between mere preparation and attempt, *United States v. Coplon*, 185 F.2d 629, 633 (2d Cir. 1950) (Learned Hand, C.J.), *cert. denied*, 342 U.S. 920 (1952), the determination as to whether an attempt has occurred is necessarily fact-specific. *Neal*, 78 F.3d at 906; *United States v. Rivera-Sola*, 713 F.2d 866, 869 (1st Cir. 1983). In the case at bar, the petitioners' conduct did not "cross the line between preparation and attempt" until, at the earliest, around 4:00 p.m. when they arrived at the Symphony Hall area of Boston to meet with the suppliers and to make arrangements to receive the cocaine. J.A. 13. At the time the guns were put in the vehicle, earlier in the day, petitioners had not even determined a time and place to meet the suppliers in order to arrange another time and place to receive the cocaine.[11] At that time,

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[11] Moreover, petitioners' plans on October 18, 1994 were distinctly vague. Petitioners met and discussed either "stealing or ripping off" cocaine which Gray-Santana had ordered from Juan Rodriguez and Ramon Vasquez. J.A. 13. Gray-Santana told Cleveland that he might get the drugs on consignment (Hearing on Motion to Suppress, May 1, 1995, at 54), thus obviating any need to use a weapon. No agreement between petitioners and suppliers as to quantity and price of drugs is referred to in the record, although Gray-Santana stated that he intended to receive one kilogram of cocaine. J.A. 26.

petitioners' actions were far from the point where, if not interrupted, they would have culminated in possession of cocaine with intent to distribute. Moreover, placing the guns in the vehicle was not, per se, a substantial step which could transform preparation into attempt, since possession of materials to be employed in the commission of a crime constitutes a substantial step only if such possession is "at or near the place contemplated for the commission of the crime." MODEL PENAL CODE § 5.01(2)(f) and cmt. 6(b)(v), (vi).

Convictions for attempt to possess controlled substances have been reversed for insufficient evidence in cases where plans to obtain drugs were much closer to execution than those in the case at bar. *See, e.g., United States v. Cea*, 914 F.2d 881 (7th Cir. 1990) (defendant met with suppliers four times, called suppliers numerous times, settled on quantity and price, found a prospective buyer, brought the buyer to meet the supplier, agreed to meet with supplier); *United States v. Delvecchio*, 816 F.2d 859 (2d Cir. 1987) (defendants had met the suppliers and had agreed as to an exact quantity and price, and had arranged an exact time and place for the transaction to take place); *United States v. Joyce*, 693 F.2d 838 (8th Cir. 1982) (defendant discussed drug purchase with informant, met with purported supplier, offered a price, and actually handled a package supposedly containing the drugs to be purchased).

Unlike the situations in *Cea*, *Delvecchio* and *Joyce*, in the case at bar petitioners' plans were tentative and unfocussed: no agreement had been reached with the suppliers as to exact quantity and price, there had been no meetings with the suppliers, there was no evidence of more than a single contact with the suppliers, and no exact time and place for a meeting, let alone a transfer of drugs, had been arranged.

Cases where evidence was found sufficient to support convictions of attempt to possess controlled substances with intent to distribute present situations where the defendants' actions came far closer to culminating in actual possession than did the petitioners' actions up to and including the point where they put the guns in the vehicle. In many of these cases the defendants were at or en route to the scene of the planned drug transaction, which was frustrated by external circumstances. *See, e.g., United States v. Wilks*, 46 F.3d 640 (7th Cir. 1995); *United States v. Rosalez-Cortez*, 19 F.3d 1210 (7th Cir. 1994); *United States v. Akers*, 987 F.2d 507 (8th Cir. 1993).

Petitioners' actions are distinguishable also from those of defendants in cases where the attempt to purchase drugs was not thwarted at the scene of the planned transfer of drugs, but defendants had taken extensive actions which brought the planned transactions much closer to fruition than did petitioners' actions. *See, e.g., United States v. Fisher*, 3 F.3d 456 (1st Cir. 1993); *United States v. Sutton*, 961 F.2d 476 (4th Cir.), *cert. denied*, 506 U.S. 858 (1992); *United States v. Pennyman*, 889 F.2d 104 (6th Cir. 1989); *United States v. Dworken*, 855 F.2d 12 (1st Cir. 1988).

For the foregoing reasons, the government's eleventh-hour attempt to salvage the convictions in this case is not properly before the Court. Moreover, the government's new argument is without merit since petitioners placed the guns in the trunk before, and not during, commission of the attempt to possess cocaine with intent to distribute.

III. CONCLUSION

For the foregoing reasons and those stated in our principal brief, the judgment of the court of appeals should be reversed.

Respectfully submitted,

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IN THE SUPREME COURT OF THE UNITED STATES
October Term, 1997

(8)

No. 96-8837
Donald E. Cleveland,
Enrique Gray-Santana
Petitioners,

v.

United States of America,
Respondent

No. 96-1654
Frank J. Muscarello,
Petitioner,

v.

United States of America,
Respondent

On Writs of Certiorari to the United States
Courts of Appeals for the First and Fifth Circuits

BRIEF FOR THE NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS AND FAMILIES AGAINST MANDATORY MINIMUMS FOUNDATION AS AMICI CURIAE IN SUPPORT OF PETITIONERS

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INTERESTS OF AMICI CURIAE[1]

The National Association of Criminal Defense Lawyers ("NACDL") is a nationwide, non-profit voluntary association of criminal defense lawyers founded in 1958 with a membership of more than 9,000 attorneys. NACDL is affiliated with 68 state and local criminal defense organizations with which it works cooperatively on issues related to criminal law and procedure, and thus, it speaks for more than 28,000 criminal defense lawyers nationwide. Among NACDL's objectives is to ensure the proper administration of criminal justice, and to promote fair and consistent application of sentencing laws.

Families Against Mandatory Minimums Foundation ("FAMM") is a nonprofit, nonpartisan, educational association that conducts research and engages in advocacy regarding mandatory minimum sentencing laws. FAMM argues that such laws, of which 18 U.S.C. § 924(c) is a prominent example, are expensive and inefficient, perpetuate unwarranted and unjust sentencing disparities, and transfer the sentencing function from the judiciary to the prosecution. Founded in 1991, FAMM has 33,103 members nationwide with 36 chapters in 26 states and the District of Columbia. FAMM does not contend that crime should go unpunished, but that the punishment should fit the crime.

I. SUMMARY OF ARGUMENT

The two cases consolidated for review by this Court are indicative not only of a split in the Circuits but of a pervasive confusion over the meaning of a simple phrase--"carries a firearm" -- contained within 18 U.S.C. § 924(c)(1).

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[1]In accordance with Supreme Court Rule 37.6, amici curiae represent that no party other than counsel for amici authored this brief in whole or in part, and no person or entity, other than amici, has made a monetary contribution to the preparation or submission of this brief. The petitioners and respondent have consented to the filing of this brief, and amici have filed the letters of consent with the Clerk of the Court, pursuant to Supreme Court Rule 37.3.

Notwithstanding the extensive linguistic, etymological, and logical gymnastics that have engaged the Courts of Appeals, this is a phrase with an obvious ordinary and natural meaning. In the relevant context of firearms, to carry means, simply, to bear upon one's person.

This contextual definition, listed under "carry arms or weapons" in BLACK'S LAW DICTIONARY 214 (6th ed. 1990), is the first and most natural meaning ascribed to the phrase by the drafters of § 924(c)(1) and other related legislation, and by this Court. *See Smith v. United States*, 508 U.S. 223, 236 (1993) ("so too would a defendant 'carry' the firearm by keeping it on his person"). Further, it fits best with this Court's instruction in *Bailey v. United States*, 116 S. Ct. 501 (1995), that each statutory term in § 924(c)(1) must be construed to have a separate meaning. Similarly, it avoids confusing overlap with many other federal statutes that employ these related terms. The best way to distinguish "carry" from "use," "transport," or "possess" is to confine the term to its ordinary and natural meaning. Such a reading makes perfect sense because as one court recently put it, "criminals who pack heat are obviously much more dangerous than those who do not." *United States v. Foster*, ___ F.3d. ___ 1998 WL 2521 at *1 (9th Cir. 1998).

Moreover, the simple definition of "carry" proposed by *amici* is easy to apply, and will discourage the lower courts from stretching statutory text by policy-driven teleological reasoning. A clear definition of "carry" will properly complete the interpretive enterprise begun by this Court in *Bailey*. Finally, the ordinary and narrow construction of § 924(c)(1) best comports with the Rule of Lenity.

II. ARGUMENT

A. INTRODUCTION

Two years ago, in *Bailey v. United States*, ___ U.S. ___, 116 S.Ct. 501 (1995), this Court addressed two issues that had troubled lower courts interpreting 18 U.S.C. § 924(c)(1),[2] a deceptively simple statute that, "has been the source of much perplexity in the courts." 116 S.Ct., at 505. The first issue was the specific meaning of the statutory phrase, "uses . . . a firearm." This Court's specific answer to that question was that the term should be interpreted quite narrowly: "the Government must show that the defendant actively employed the firearm during and in relation to the predicate crime." *Id.* at 509.

The second issue was perhaps less straightforward, but *Bailey* offered genuine guidance in how to resolve it. That issue is one of method -- how should courts interpret the potentially ambiguous terms "use" and "carry" in a criminal statute? A pessimist might suggest that the current split in the Circuits reaffirms the truth of what Justice Scalia has recently conceded is "a sad commentary": "that American courts have no intelligible, generally accepted, and consistently applied theory of statutory interpretation." HENRY M. HART, JR. & ALBERT M. SACKS, THE LEGAL PROCESS 1169 (William N. Eskridge, Jr. & Phillip P. Frickey eds. 1994), cited in ANTONIN

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[2] 18 U.S.C.§ 924(c)(1) provides in relevant part:

> Whoever, during and in relation to any crime of violence or drug trafficking crime . . . uses or carries a firearm, shall, in addition to the punishment provided for such crime of violence or drug trafficking crime, be sentenced to imprisonment for five years, and if the firearm is a short-barreled rifle, short-barreled shotgun, or semiautomatic assault weapon, to imprisonment for ten years, and if the firearm is a machinegun, or a destructive device, or is equipped with a firearm silencer or firearm muffler, to imprisonment for thirty years.

SCALIA, ET AL. A MATTER OF INTERPRETATION 14 (1997). Closer analysis of *Bailey*, however, offers a clear path through the thicket. Indeed, proper application of quite basic methods of statutory construction compels the conclusion that the lower courts have simply misunderstood that, especially in the context of criminal statutes, "statutory construction means...that the Court can *construe* statutes but not that it can *construct* them." *Rosenberg v. Fleuti*, 374 U.S. 449 (1963) (dissent of Clark, J., joined by Harlan, Stewart, and White, JJ.).

There may very well be compelling public policy reasons to punish harshly those who transport, or possess, even constructively, firearms, "during and in relation to any crime of violence or drug trafficking crime." It appears that *post-Bailey*, the lower federal courts have been swayed by just such considerations. *See United States v. Miller*, 84 F.3d 1244, 1259 (10th Cir. 1996) (discussing numerous cases from the First, Second, Sixth, Seventh, Ninth, and Eleventh Circuits that applied a broader interpretation of "carry a firearm" following *Bailey*); *see also* Note & Comment, *The Aftermath of Bailey v. United States: Should Possession Replace Carry and Use Under 18 U.S.C. § 924(c)(1)?*, 5 J. L.& POL'Y 679, 697 (1997) ("It is clear that after *Bailey*, the Second Circuit, along with many others, is defining 'carry' more broadly."). Policy justifications, however, cannot legitimize judicial interpretations that are unsupported by the language of the statute, its context, and its history.

It is not surprising that the Courts of Appeals are as hopelessly tangled and divided over the proper meaning of "carries a firearm" as they are. As in the years before *Bailey* when some of the lower courts used § 924(c)(1) as a cudgel, expanding "use a firearm" beyond the reasonable, the lower courts have simply exceeded their interpretive charge. Their lack of consensus is the inevitable result of unwarranted straying from the ordinary, core meaning of the phrase, in the process ignoring venerable principles for the construction of

criminal statutes.

B. THE ORDINARY AND NATURAL MEANING OF THE PHRASE "CARRY A FIREARM" IS LIMITED TO THE PERSON

This Court has been clearer about nothing than that the starting point of statutory interpretation must be the language of the statute, which is to be interpreted according to "its 'ordinary or natural' meaning." *Bailey*, ___ U.S., at ___, 116 S. Ct., at 506 (quoting *Smith v. United States*, 508 U.S. 223, 228 (1993)). The widely divergent etymological conclusions of the Courts of Appeals could indicate that a strict dictionary-based solution to this problem is elusive. One difficulty is that the English word "carry" seems to be susceptible of a number of "ordinary and natural" meanings. It can mean "[t]o wear, bear . . . upon the person or in the clothing or in a pocket, for the purpose of use . . . ." BLACK'S LAW DICTIONARY 214 (6th ed. 1990). Or, as the Court of Appeals for the First Circuit has held, "carry" could essentially mean "transport": "moving to a location some distance away . . . . by car or cart . . . in ref[erence] to ...loads on trucks, wagons, planes, ships, or even beasts of burden." *Cleveland v. United States*, 106 F.3d 1056, 1066 (1st Cir. 1997) (quoting WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY OF THE ENGLISH LANGUAGE UNABRIDGED 343 (3d ed. 1971)). *See also id.*, 106 F.3d at 1068 ("the ordinary meaning of the term 'carry' includes transport by vehicle"). Or it could even mean to communicate (as in "carry a tune"), have in stock (as when a store "carries inventory"), prolong (as in a lesson that is "carried over" to the next day), or to be infectious (as in "carrying a disease").

But the presence of multiple meanings in a dictionary hardly creates a dilemma, in itself, since a trip to the

dictionary should not be undertaken with a mind cleansed of any knowledge of context. As this Court said in *Bailey*, statutory language "draws meaning from its context, and we will look not only to the word itself." 116 S.Ct., at 505. *See also id.* at 506 ("[T]he meaning of statutory language, plain or not, depends on context.") (citations omitted). Thus, the phrase "carries a firearm" has a more limited, more specific meaning than the word "carry" has in general. We know this because we recognize that the interpretive task is not to determine the meaning of the word "carry" in general but only its meaning in relation to a firearm.

Of the principal dictionary definitions of "carry," only one specifically links the verb with the object -- a firearm -- relevant to these cases. Black's Law Dictionary, in fact, defines not only the verb but the entire phrase "carry arms or weapons." This phrase is best seen as essentially a legal term of art signifying, as Black's puts it: "To wear, bear, or carry them upon the person or in the clothing or in a pocket, for the purpose of use, or for the purpose of being armed and ready for offensive or defensive action in case of a conflict with another person." BLACK'S LAW DICTIONARY, *supra*, at 214. *See also* WEBSTER'S II NEW COLLEGE DICTIONARY, at 170 (1995) (carry means "[t]o have or keep on one's person [*carry* a gun]"). That is, "carry a firearm" means, in Judge Kozinski's colorful phrase, "to pack heat." *United States v. Foster*, ___ F.3d. ___, 1998 WL 2521, *1 (9th Cir. 1998). It does not mean to have available, or to store, or to transport, or to possess. The meaning is simple and clear: to wear or bear on the person.

This Court's own passing reference, in *Bailey*, to the phrase "carry a firearm" underscores that the core, "ordinary and natural" meaning of the phrase is "on the person." As the Court explained the difference between "using" and "carrying" a firearm, the Court described carrying in a narrow way. "[A] firearm can be carried without being used,

e.g., when an offender keeps a gun *hidden in his clothing* throughout a drug transaction." 116 S.Ct., at 507 (emphasis added). Similarly, in *Smith v. United States*, 508 U.S. 223, 236 (1993), the Court made another passing reference to "carry a firearm" and in doing so revealed the core, "ordinary and natural" meaning of the phrase.

> Just as a defendant may 'use' a firearm within the meaning of § 924(c)(1) by trading it for drugs or using it to shoot someone, so too would a defendant 'carry' the firearm *by keeping it on his person* whether he intends to exchange it for cocaine or fire it in self-defense.

508 U.S., at 236 (emphasis added).

The "ordinary and natural" meaning Black's Law Dictionary ascribes to "carry a firearm" mandates that convictions in both the instant cases should be overturned. A firearm transported in a car's trunk or in a glovebox is not being carried on the person. That much is clear.[3] Given the direct relevance of this specific, legal definition, this Court should simply stop here. The text is clear, and its "ordinary and natural" meaning, in context, is clearly set out in the most relevant legal dictionary. There is little reason to excavate further, and the courts that have done so have reaped only confusion.

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[3]Nor is a firearm transported in a trunk or glovebox being carried "about the person." The best meaning of that phrase connotes the possession of a firearm in a backpack, or case, or coat pocket or some other container that is itself on the person or held by the person. *See, e.g., Diffey v. State*, 86 Ala. 66, 5 So. 576 (1888); *Avery v. Commonwealth*, 223 Ky. 248, 3 S.W.2d 624 (1928) (in receptacle attached to or carried by the person).

C. OTHER INTERPRETIVE TOOLS SUPPORT THE PROPOSITION THAT "CARRY A FIREARM" MEANS "ON THE PERSON"

If the Court wishes to peek behind the curtain of "ordinary and natural" meaning, the equation of "carry a firearm" with "on the person" is bolstered further.

1. The Placement and Purpose of "Carry a Firearm" in the Statutory Scheme Confines Its Meaning to the Person

The "ordinary and natural" meaning of "carry a firearm" set out in Black's Law Dictionary fits well within a more coherent and more comprehensive reading of the entire statutory scheme. This Court made very clear in *Bailey* that since Congress used two distinct terms in § 924(c)(1) they must each be construed to have a distinct meaning. *See* 116 S.Ct., at 506 ("we read § 924(c)(1) with the assumption that Congress intended each of its terms to have meaning"). There must thus be a way to use a gun without carrying it and, conversely, it should be possible to carry a gun without using it. *Bailey*, 116 S. Ct., at 507.

But it is also important to realize that although they are distinct, "use" and "carry," in this context, are cousins. The Court assumes that Congress picks its words with care. As the Latin maxim puts it, *noscitur a sociis* -- "it is known from its associates." BLACK'S LAW DICTIONARY 956 (rev. 5th ed. 1979). In this statute, it is apparent that "use" and "carry" were linked so that it was reasonable to use those words and no others. Thus, we can gain insight into the best meaning of "carry a firearm" by looking at the meaning of "use a firearm."

In *Bailey*, this Court made clear that "use a firearm" required some active and direct link to the underlying crime. Congress chose the phrase "use a firearm" rather than "have available for use" or "intend to use" in order to emphasize the requirement that the employment of the firearm have an

immediate and close connection with the underlying crime. *See* 116 S.Ct., at 507 ("In § 924(c)(1), . . . liability attaches only to cases of actual use, not intended use."). *Bailey*, then, interpreted "use a firearm" quite narrowly.

"Carry a firearm" should be similarly interpreted. That is, the best reading of the statute is that Congress intended "carry a firearm" to be akin to "use a firearm" while offering something that the latter phrase did not. The ordinary and natural meaning of "carry a firearm" suggested by Black's Law Dictionary satisfies this condition. As the definition itself makes clear, the meaning of "carry a firearm" is directly linked to using a firearm: "[t]o wear, bear, or carry [] upon the person or in the clothing or in a pocket, *for the purpose of use*, or for the purpose of being armed and ready for offensive or defensive action in case of a conflict with another person." BLACK'S LAW DICTIONARY 214 (6th ed. 1990) (emphasis added). Congress, to put it metaphorically, decided that the center of the statutory target was the link between the underlying crime and a firearm's "active employment," *Bailey*, 116 S.Ct., at 508, and that the next concentric circle outside the bull's eye was to have a firearm on one's person so as to have it available immediately for use. This reading would thus link "carry a firearm" to "use a firearm" by the immediacy to the perpetrator of the underlying crime that both phrases require. It would be anomalous indeed for "use a firearm" to be interpreted as containing an immediacy requirement, as this Court held in *Bailey*, and for "carry a firearm" to be construed as containing a requirement of only the thinnest reed of a connection with the underlying crime.

Moreover, this narrow reading of "carry a firearm" best fits within the most likely legislative purpose behind § 924(c)(1). As Judge Kozinski has explained, "[c]riminals who pack heat are obviously much more dangerous than those who do not." *Foster*, ___ F.3d, at ___, 1998 WL 2521, at *1. *See also id.* at *4 ("Using or carrying guns makes those crimes

more dangerous. A drug dealer who packs heat is more likely to hurt someone or provoke someone else to violence.") Section 924(c) provides for penalties that are among the harshest of any found in all of § 924. *See* Pet. Br. at 25. It is reasonable, then, to assume that what Congress sought to make unlawful was the closest of connections between firearms and other crimes.

This reading of "carry a firearm," which takes its cue from the narrow meaning of "use a firearm" and the likely legislative focus on the immediate connection between the underlying crime and the firearm itself, has an additional virtue. This virtue is that it separates the meaning of "carry a firearm" from "possess a firearm," "transport a firearm," and "store a firearm." In *Bailey*, this Court made clear that "use" must mean something different from "possess" in the context of § 924(c). *See* 116 S.Ct., at 506. The Court reached this conclusion because of "the frequent use of the term 'possess' in the gun-crime statutes to describe gun-related conduct." *Id.* The same reasoning would hold true, of course, with regard to "carry a firearm." The narrow, ordinary and natural meaning of "carry a firearm" that limits its meaning to "on the person" ensures that it will not be confused with "transport," which also appears frequently in gun-crime statutes. *See, e.g.*, 18 U.S.C. § 926A.[4] Moreover, as *Bailey* made clear, both "possess" and

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[4]The Congressional understanding that "carries a firearm" differs from "transports a firearm" is perfectly illustrated by 18 U.S.C. § 926A, which was enacted into law in 1986 and which provides in relevant part,

> Notwithstanding any other provision of any law or any rule or regulation of a State or any political subdivision thereof, any person who is not otherwise prohibited by this chapter from transporting, shipping, or receiving a firearm shall be entitled to *transport* a firearm for any lawful purpose from any place where he may lawfully *possess and carry* such firearm to any other place where he may lawfully possess and carry such firearm if, during such transportation the firearm is unloaded, and

"carry a firearm" must mean something more than "storage": "A defendant cannot be charged under § 924(c)(1) merely for storing a weapon near drugs or drug proceeds. Storage of a firearm, without its more active employment, is not reasonably distinguishable from possession." 116 S.Ct., at 508. The narrow definition of "carry a firearm" establishes the best and clearest distinction between that phrase and "possess," "transport," and "store."

2. The Ordinary and Natural Meaning of "Carry a Firearm" Is Simple and Easy to Apply

One of the reasons that this Court held in *Bailey* that "use a firearm" means "active employment" of a firearm, was that alternative meanings of the phrase made for confusing and inconsistent application. This same rationale supports a reading of "carry a firearm" as equivalent to "on the person."

If the meaning of "carry a firearm" is uncoupled from its traditional link to the body, then the interpretation of the phrase "carry a firearm" will turn on manipulable and difficult-to-define conceptions of accessibility and proximity. With such a loose test, as this Court recognized in *Bailey*, courts eventually fall down a slippery slope toward making unlawful

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> neither the firearm nor any ammunition being transported is readily accessible or is directly accessible from the passenger compartment of such transporting vehicle:
> Provided, that in the case of a vehicle without a compartment separate from the driver's compartment the firearm or ammunition shall be contained in a locked container other than the glove compartment or console.

(emphasis added).

See also 49 U.S.C. § 46505 (1997) ("Carrying a weapon or explosive on an aircraft") (distinguishing "to carry a dangerous weapon" in sub-section (d)(2), from "transporting a weapon" in sub-section (d)(3)).

under § 924(c) practically all firearms possession in connection with a crime of violence or drug trafficking crime. "[The] proximity and accessibility standard provides almost no limitation on the kind of possession that would be criminalized; in practice, nearly every possession of a firearm by a person engaged in drug trafficking would satisfy the standard, 'thereby eras[ing] the line that the statutes, and the courts, have tried to draw.'" *Bailey*, 116 S.Ct., at 506 (quoting *United States v. McFadden*, 13 F.3d 463, 469 (1st Cir. 1994) (Breyer, C.J., dissenting)).

Even if "carry a firearm" is expanded to mean close to -- but not on -- the person, virtually unresolvable line drawing dilemmas result. Again, as this Court noted in *Bailey*, "some might argue that the offender has 'actively employed' the gun by hiding it where he can grab and use it if necessary." 116 S.Ct., at 508. Similar arguments could be made with regard to "carry a firearm." These arguments should be answered as the Court answered the analogous assertion in *Bailey*. They "create an impossible line-drawing problem. How 'at the ready' was the firearm? Within arm's reach? In the room? In the house?" 116 S.Ct., at 509. It would be senseless indeed to establish, on the one hand, a clear, narrow rule for "use" that avoids messy line-drawing difficulties of determining accessibility and proximity and then, on the other hand, to adopt a rule for "carry" that creates those same problems. An adoption of the narrow, ordinary and natural meaning of "carry a firearm" avoids these difficulties.

3. The Legislative History Supports the Meaning of "Carry a Firearm" as Confined to the Person

It has been noted recently that there is "mercifully little legislative history on 'carry.'" *Foster*, ___ F.3d, at ___, 1998 WL 2521, at *4, n.8. Nevertheless, the legislative history that does exist further shows that the "ordinary and natural"

meaning of "carry a firearm," as suggested by Black's Law Dictionary, was what was enacted by Congress in § 924(c)(1).

While legislative history from § 924(c)'s initial passage is not particularly illuminating, important insights can be gained from the history of the 1984 revisions, which came as a part of the Comprehensive Crime Control Act of 1984, Pub. L. No. 98-473, §1005(a), 98 Stat. 2138-2139. In particular, Congress substituted the phrase "crime of violence" for the term "felony" in order to include violent misdemeanors and to exclude non-violent felonies. *See* S. Rep. No. 225, 98th Cong., 2d Sess. 313 n.9 (1983). Additionally, Congress merged the "uses" and "carries" prongs of the statute, deleted the requirements that the firearm be used "to commit" the offense or the weapon be carried "unlawfully," and imposed instead the "during and in relation to" requirement with respect to both "uses" and "carries" liability.[5] These changes were substantial but there is absolutely no indication that the revision of the statute included a change in the understanding that carrying a firearm means to bear it on one's person. Indeed, in a footnote immediately following its explanation of the enhanced sentencing provision, the Committee Report observed:

> Evidence that the defendant had *a gun in his pocket* but did not display it, or refer to it, could nevertheless support a conviction for "carrying" a firearm in relation to the crime if from the

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[5]The 1984 amendment to § 924(c) read in pertinent part as follows:

> Whoever, during and in relation to any crime of violence, including a crime of violence which provides for an enhanced punishment if committed by the use of a deadly or dangerous weapon or device, for which he may be prosecuted in a court of the United States, uses or carries a firearm, shall, in addition to the punishment provided for such crime of violence, be sentenced to imprisonment for five years.

Pub. L. No. 98-473, § 1005(a), 98 Stat. 1837, 2138, 2139.

> circumstances or otherwise it could be found that the defendant intended to use the gun if a contingency arose or to make his escape . . . ."

S. Rep. No. 89-255, at 314 n. 10 (1983), reprinted in 1984 U.S.C.C.A.N. 3492 n. 10 (emphasis added).

Various unsuccessful attempts to amend § 924(c) over the course of the past ten years show that "carry" is generally understood both to mean something substantially more narrow than possession and, most specifically, to mean borne by a person. Although failed attempts at legislative change are in general an obviously weak indicator of legislative intent, they do seem to indicate a widely-accepted background understanding of the meaning of "carry" in this context. *See United States v. Fisher*, 6 U.S. (2 Cranch) 358, 386 (1985) (Marshall, C.J.) ("where the mind labors to discover the design of the legislature, it seizes everything from which aid can be derived"). A 1989 bill, for example, was aimed at "broadening" § 924(c) "to reach persons who have a firearm ... available during the commission of certain crimes, even if the firearm is not carried or used," as where "a loaded firearm is found in the dresser drawer of an apartment which the defendant utilizes in connection with his drug dealings." *See, e.g.*, S1225, 101st Cong., 1st Sess. §113 (1989) (proposing to replace "uses or carries a firearm" with "uses, carries, or *otherwise possesses* a firearm") (emphasis added); S1256, 103d Cong. 1st Sess. § 1007 (1993)(same); S2305, 102d Cong.. 2d Sess. §401 (1992) (proposing to replace "uses or carries" with "knowingly uses, carries, or otherwise possesses"). *See generally,* Clark D. Cunningham & Charles J. Fillmore, *Using Common Sense: A Linguistic Perspective on Judicial Interpretations of "Use a Firearm,"* 73 WASH. U. L.Q. 1159, 1198-1203 (1995) (describing and analyzing Congress's post-1988 efforts to expand statute to cover possession of firearm). Examples cited in debate over these bills are instructive as to the understanding of what it means to carry a firearm: "The

requirement that the firearm's use or possession be 'in relation to' the crime would preclude its application in a situation where its presence played no part in the crime, such as a gun *carried in a pocket* and never displayed or referred to in the course of a pugilistic barroom fight." S. Rep. No. 225, 98th Cong., 2d Sess. 314 n. 10 (1983) (emphasis added), reprinted in 1984 U.S.C.C.A.N. 3182, 3492 n.10. The passage also contains the following statement:

> Evidence that the defendant had a gun in his pocket but did not display it, or refer to it, could nevertheless support a conviction for 'carrying' a firearm in relation to the crime if from the circumstances or otherwise it could be found that the defendant intended to use the gun if a contingency arose or to make his escape.

S. Rep. No. 225, at 314 n.10, reprinted in 1984 U.S.C.C.A.N. at 3492.

More recent debates and testimony demonstrate even more clearly the virtual consensus that "carry" has a substantially more narrow meaning that "possess." For example, various legislative proposals have been made to expand the reach of § 924(c)(1) beyond carry to possession. *See e.g.*, S. 1612, "A bill to provide for increased mandatory minimum sentences for criminals possessing firearms, and for other purposes" (providing for a ten year mandatory minimum sentence for "any criminal possessing a gun during and in relation to the commission of a violent or drug trafficking crime.") 142 Cong. Rec. S1976 (daily ed. March 13, 1996) (passed by the Senate on October 3, 1996, as "A bill to broaden the scope of certain firearms offenses, and for other purposes"). *See* Appendix. 142 Cong. Rec. No. 141, S12390; *see also* S.1945, "A bill to broaden the scope of certain firearms offenses" (described by its sponsor, Sen. DeWine as designed to "cover all circumstances in which a drug dealer or violent criminal is caught with a firearm" [by adding the language]

"uses or carries a firearm...or has a firearm in close proximity at the time of arrest or at the point of sale of illegal drugs") 142 Cong. Rec. S7762, 7764-5 (daily ed. July 11, 1996).

The understanding of the significant difference between "carry" and "possess," was demonstrated by the following colorful argument made by Sen. Helms, the sponsor of S. 1612:

> "As a result of the Court's [*Bailey*] decision, any thug who hides a gun under the back seat of his car, or who stashes a gun with his drugs, may now get off with a slap on the wrist . . . I believe that *mere possession* of a firearm, during the commission of a violent felony--even if the weapon is not actively used--should nonetheless be punished . . ."

142 Cong. Rec. S1976-7 (daily ed. March 13, 1996).

Although unsuccessful in his attempts to amend § 924(c)(1) in 1996, Sen. Helms, in 1997, spoke in support of S. 43, "A bill to throttle criminal use of guns," which provided that a 5-year mandatory minimum sentence shall be imposed upon any criminal *possessing* a gun during and in relation to the commission of a violent or drug trafficking crime.[6] The Senator was equally clear that "carry" was much more narrow than "possess."

> The bill I am introducing today will correct the Supreme Court's [*Bailey*] blunder, and it will crack down on gun-toting thugs who commit all manner of unspeakable crimes . . . violent felons who *possess* firearms are demonstrably

[6]If the criminal were to fire the weapon, the mandatory penalty would be elevated to 10 years. If there were a killing during the crime, the punishment would be life imprisonment or the death penalty.

> more dangerous than those who do not. . . . Current Federal law provides that a person who, during a Federal crime of violence or drug trafficking crime, uses or carries a firearm shall be sentenced to 5 years in prison . . . . But along came the Supreme Court's unwise decision thwarting prosecutors' effective use of this statute. The Court . . . interpreted the law to require that a violent felon actively employ a firearm as a precondition of receiving an additional 5-year sentence. The Court held that the firearm must be brandished, fired or otherwise actively used; so if a *criminal merely possesses* a firearm, but doesn't fire or otherwise use it, he escapes the additional 5 year penalty.

143 Cong. Rec. S405 (daily ed. January 21, 1997) (emphasis added).

Sen. Helms, of course, does not speak for the entire Congress, or even necessarily the Senate. This Court, however, should take note of the fact that the entire Congress appears to agree that the current statute does not punish the functional equivalent of possession of a firearm and that any expansion of the meaning of "carry" in § 924(c)(1) should be a legislative task. Bills that have passed both the House and the Senate in the past two years further show a consensus that the phrase "carry a firearm" is significantly narrower than "possess a firearm." *See* Appendix (reprinting relevant portions of bills).

Discussion over why it might be necessary to add a possession prong to § 924(c)(1) has also been surprisingly probative of how "carry" is generally understood. Indeed, even testimony by federal prosecutors has confirmed the general proposition that "carry" has a significantly narrower meaning than "possess." On May 8, 1997, Kevin DiGregory, Deputy

Assistant Attorney General, General Criminal Division of the Department of Justice, testified before the Senate Committee on the Judiciary on the general subjects of *Bailey* and 18 U.S.C. § 924(c). Federal Information Systems Corporation, Federal News Service, Section: In the News, Prepared Statement of Kevin DiGregory; May 8, 1997. Mr DiGregory described various legislative proposals then pending in the Senate.[7]

In later testimony the same day, both Mr. DiGregory and another witness, Walter C. Holton, Jr., United States Attorney for the Middle District of North Carolina argued that the substitution of the word "possess" would eliminate the need for "use" and "carry." More specifically, though, the following dialogue indicated the basic difference between "carry" and "possess":

> Sen. Sessions: ...Mr. Holton, I think if you were prosecuting a case and the person actually carried the gun during the drug offense, you would charge that and possess too. You'd charge carry and possess. Perhaps if it was under the seat of the car, you would probably charge it just possess. Do you think?
>
> Mr. Holton: I think that's a fair distinction--

Id. at 23.

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[7]The first, S. 362, introduced by Senators Leahy and Biden and supported by the Administration, simply substituted the phrase "possess a firearm" for "uses or carries". In contrast, the formulation of S.43 and S.3, proposed by Senators Helms, Hatch and DeWine, added the term "possess" to "uses or carries." Finally, S.15, also proposed by Senators Leahy, Biden and others, would also substitute "possesses" for "uses or carries" but it also change "in relation to " to "in close proximity to." *Id.* at 2.

D. THE ATTEMPT BY THE COURTS OF APPEALS TO EXTEND THE MEANING OF "CARRY" BEYOND THE PERSON HAS LED TO UNNECESSARY CONFUSION AND COMPLEXITY

In comparison to the natural, reasonable reading of "carry a firearm" as meaning "on the person," it is worth considering the mistaken reading of the statute performed by most of the Courts of Appeals. Rather than depending on the core, ordinary and natural meaning of "carry a firearm," some Courts of Appeals have equated the terms "carry" and "transport." They have achieved this result by, first, divorcing "carry" from its relevant object--"firearm." They then rely upon what appears to be a teleological, policy-based, and arbitrary choice among dictionary definitions. *See, e.g., Cleveland*, 106 F.3d at 1067 (holding that Black's "on the person" definition is "inapposite" because of doubts that Congress would mean to exclude defendant who "transports" the gun in his car). The first part of this method has been expressly disavowed by this Court. *See Deal v. United States*, 508 U.S. 129, 133 (1993) (criticizing "the regrettable penchant for construing words in isolation.") The second is patently improper.

The feat of interpretive legerdemain tends to lead to a focus on movement because the severance from plain meaning necessitates a point of distinction (other than the body) between "carry" and "possess." But the recourse to movement leads to absurd results. It is absurd, for example, to conclude that Congress intended to punish a person who sells drugs while holding a gun in his jacket pocket while walking but not to punish him if he stands still. The danger that Congress sought to address was not that of movement of weapons. As noted above, "transportation" is dealt with elsewhere in any event. *See, e.g.*, 18 U.S.C. §§ 922(a)(1)(A), 922(a)(1)(B), 922(a)(2), 922(a)(3), 922(a)(4), 922(a)(5), 922(e), 922(f)(1), 922(h),

922(i), 922(j), 922(k), 922(n), 924(b), 925(a)(1), 925(a)(2), 925(a)(4). *See also Foster*, ___ F.3d, at ___, 1998 WL 2521, at *3. Rather, the focus of § 924(c)(1) was clearly the close connection between firearms and persons committing crimes of violence or drug trafficking. Movement was not the key.

This can be illustrated with a couple of straightforward hypotheticals. An engineer in the engine of a train could not reasonably be said to be "carrying" a firearm he has stored in a compartment in the caboose a half-mile away. Nor could a captain standing on the bridge of an ocean liner be said to be "carrying" a firearm he has stashed among his belongings in his quarters several decks below. In both cases, the person possessing the firearm is moving it along with him. In both cases, the firearm is being "move[d] while supporting," is being "move[d] an appreciable distance without dragging," and is being "sustain[ed] as a burden or a load and [brought] along to another place." *Cleveland*, 106 F.3d, at 1066 (quoting WEBSTER'S THIRD, *supra*, at 343). Yet it is obviously inconsistent with the "plain meaning" of "carry" in this specific context to sweep these hypotheticals within its purview. The carry-as-transportation logic of the First and Fifth Circuits in the cases below would render both the ship captain and the train engineer criminally liable under § 924(c)(1) if they committed a relevant underlying crime in the train engine or on the ship's bridge, even if the firearms were a great distance away but still on the same moving vehicle. To impose liability in such a situation is incongruous with the purpose of the statute.

The incorrect focus on movement also tends to implicate yet another complicated requirement--that of "immediate accessibility." Some courts have seemed to rely exclusively on this concept, *see United States v. Hernandez*, 80 F.3d 1253, 1257 (9th Cir. 1996) (concluding that the "ordinary and natural" meaning requires immediate availability for use), while others have combined it with the transport element. *See*

United States v. Ramirez-Ferrer, 82 F. 3d 1149, 1154 (1st Cir. 1996); *cert. denied*, 117 S. Ct. 405 (1996) (loaded gun on a boat within "easy reach" held to be carried); *United States v. Riascos-Suarez*, 73 F.3d 616, 623 (6th Cir. 1996) (finding gun transported in a vehicle and "within reach and immediately available for use" sufficient evidence of "carrying"); *but see United States v. Mitchell*, 104 F.3d 649, 653 (4th Cir. 1997) ("plain meaning" does not require that firearm be readily accessible). As noted above, however, the problem of accessibility only arises if one strays from the core (on the person) definition. The best way to avoid it is simply to rely on the plain meaning of the statutory term.

Accessibility provides a possible way to *expand* the plain and ordinary meaning but, like mobility, it raises significant problems. Most obviously, it creates a line-drawing problem between "carry" and "possess." A gun on a table in the living room is perhaps immediately accessible and is certainly possessed. It would not, however, ordinarily be thought of as "carried."

Those courts that have postulated locomotion or immediate accessibility as core meanings of "carry a firearm" have, so to speak, put the cart before the horse. To the extent that these concepts may inhere in the phrase "carry a firearm" it is only because the core meaning of that phrase is "on the person."

One additional factor argues against an adoption of the movement-based construction of § 924(c)(1). Under such a reading, "carry a firearm" would mean something different when a defendant is in his house, or on the sidewalk, or in a store or park or office building, from when he steps into a car or other vehicle. *See Muscarello*, 106 F.3d at 639 ("[W]e observe that what constitutes 'carrying' under § 924(c) when the firearm is possessed in the motor vehicle differs substantially from what constitutes carrying a firearm in a non-vehicle situation."). Outside the vehicle, movement or

potential movement is not part of the definition. Inside the car, movement becomes the touchstone. Not only is such a result messy, it flies in the face of any reasonable method of statutory interpretation -- why would "carry" mean something different inside a car any more than "use" would?

The carry-as-transportation construction also creates anomalies. A defendant who sold drugs in his living room, with a gun in an adjacent room but out of sight, would not be liable under this construction of § 924(c)(1). Yet if the defendant sold drugs from a car, the carry-as-transportation reading of § 924(c) would make unlawful the presence of a firearm that was, say, in the trunk, even if it was no more accessible to the defendant in the driver's seat than the gun in the adjacent room was to the defendant in the living room. The ordinary and natural reading of "carry" to mean "on the person" would be the same inside or outside a car, on board a ship or on shore, and inside one's abode or outside on the sidewalk.

E. A NARROW READING OF "CARRY A FIREARM" IS REQUIRED BY THE RULE OF LENITY

Even if the Court believes that the sum of these arguments do not remove all uncertainty with regard to the best reading of "carry a firearm" in § 924(c)(1), there should be little doubt that the narrow "on the person" reading is a principal contestant. Not only does it comport with the most relevant dictionary meanings, it also makes sense within the statutory scheme, is easy and simple to apply, and is most closely aligned with evidence from the legislative history. In such a situation, any remaining doubt that this Court should adopt a narrow reading should be resolved by the Rule of Lenity.

This "venerable rule," *Smith*, 508 U.S., at 239, requiring that "penal laws are to be construed strictly, is perhaps not

much less old than construction itself." *United States v. Wiltberger*, 18 U.S. (5 Wheat.) 76, 95 (1820); *see also* ANTONIN SCALIA, A MATTER OF INTERPRETATION 29 (1997) ("The rule of lenity is almost as old as the common law itself."). As Chief Justice Marshall explained, the Rule "is founded on the tenderness of the law for the rights of individuals; and on the plain principle, that the power of punishment is vested in the legislature, not in the judicial department." *Id.* Thus, the Rule "insists that only the legislature define crime, and that the definition be clear and precise before courts may impose punishment." Sarah Newland, *The Mercy of Scalia: Statutory Construction and the Rule of Lenity*, 29 HARV. C.R.-C.L. L. REV. 197, 201 (1994). The Rule also emphasizes that the accused should receive fair warning that her conduct falls within the statutory prohibition. *Id.* As Justice Holmes taught, "it is reasonable that a fair warning should be given to the world in language that the common world will understand, of what the law intends to do if a certain line is passed." *McBoyle v. United States*, 283 U.S. 25, 27 (1931). *See also* William N. Eskridge, Jr., *Overriding Supreme Court Statutory Interpretation Decisions*, 101 YALE L. J. 331, 413-14 (1991) (The Rule of Lenity "serves the representation-reinforcing goal of protecting a relatively powerless group [people accused of committing crimes] and the normativist goal of injecting due process values of notice, fairness, and proportionality into the political process.").

Importantly, the Rule of Lenity provides a check on judicial activism. It is often tempting for courts to expand the reach of a criminal statute, ever so slightly, in order to cover the conduct of a defendant whose conduct falls just outside the express language of a criminal statute. Not holding responsible someone just barely beyond the express language may seem unjust, or illogical. Indeed, the courts interpreting § 924(c)(1) might be rightly charged with such well-intentioned, but misguided, expansion. *See, e.g., United States v. Cleveland*, 106 F.3d 1056, 1067 (1st Cir. 1997) ("We strongly doubt . . .

that Congress . . . meant to exclude a defendant who transports the gun in his car, rather than on his person, for use in a drug transaction."). As Chief Justice Marshall explained, the Rule of Lenity seeks to guard against this very natural impulse:

> It would be dangerous, indeed, to carry the principle, that a case which is within the reason or mischief of a statute, is within its provisions, so far as to punish a crime not enumerated in the statute, because it is of equal atrocity, or of kindred character, with those which are enumerated.

Wiltberger, 18 U.S., at 96.

The Court's more recent pronouncements make it clear that the Rule of Lenity continues to hold an important place in the Court's interpretive practice. This Court explained in *United States v. Bass*, 404 U.S. 336 (1971) that "'when choice has to be made between two readings of what conduct Congress has made a crime, it is appropriate, before we choose the harsher alternative, to require that Congress should have spoken in language that is *clear and definite*.' *Id.* at 347 (quoting *United States v. Universal C.I.T. Credit Corp.*, 344 U.S. 218, 221-22 (1952) (emphasis added)). The Court thus harkened back to Justice Frankfurter's language in *C.I.T.*, in which he explained that the Rule of Lenity should apply when a statute "cannot be said to be decisively clear on its face one way or another." 344 U.S., at 224. *See also Bell v. United States*, 349 U.S. 81, 84 (1955) (Rule of Lenity should apply "if Congress does not fix the punishment for a federal offense clearly and without ambiguity.") Also in *Bass*, this Court depended on the Rule of Lenity because Congress had not "'plainly and unmistakably'" spoken. 404 U.S., at 348 (quoting *United States v. Gradwell*, 243 U.S. 476, 485 (1917). Applied to the instant case, this language should be extremely helpful. Even at best, the government's reading of § 924(c) can hardly be said to be "clear and definite." Nor can, even at best,

the government's construction be fairly said to be "decisively clear" or "plain[] and unmistak[en]."

To be sure, this Court has stated that the Rule of Lenity does not hold Congress to an impossible level of specificity. *See* SCALIA, *supra*, at 28 ("Every statute that comes into litigation is to some degree 'ambiguous.'"). In *Smith*, for example, this Court stated that the Rule should come into play most usually after other tools of statutory construction have been exhausted. 508 U.S., at 239-40. Thus in *Smith*, the Court decided that "use [of] a firearm" included the use of it for barter, declining to use the Rule of Lenity as the basis for a more narrow reading. The Court reached its conclusion because the government's proposed construction fell "squarely within the common usage and dictionary definitions" of the statutory phrase and because "Congress affirmatively demonstrated that it meant to include transactions" like the defendant's in that case. 508 U.S., at 240.

The government's proposed broad reading of § 924(c)(1) in the instant case meets neither of these conditions. Congress did not affirmatively demonstrate that "carry a firearm" meant to transport it in a vehicle. Moreover, as argued above, the "transportation" interpretation of § 924(c)(1) would fall outside the common usage and most relevant dictionary meanings of "carry a firearm."

Moreover, in describing why the Rule of Lenity should not apply in *Smith*, the Court in effect offered justifications for why it should apply in the present case. The Court noted that "the *mere possibility* of articulating a narrower construction . . . does not by itself make the rule of lenity applicable." 508 U.S., at 239 (emphasis added). The Court also observed that "the rule of lenity 'cannot dictate an *implausible* interpretation of a statute, nor one *at odds* with the generally accepted contemporary meaning of a term.'" *Id.*, at 240 (quoting *Taylor v. United States*, 495 U.S. 575, 596 (1990)) (emphases added). The Court held that a definition of "use a firearm" that did not

include bartering would "*do[] violence* not only to the structure and language of the statute but its purpose as well." 508 U.S., at 240.

These descriptions of when the Rule should not apply strengthen the case for its application here. There can be no question, given the strong arguments supporting an "on the person" construction of "carry a firearm," that there is more than a "mere possibility" of articulating a narrow construction of the phrase. Similarly, no one could reasonably argue that a definition that fits squarely within the most relevant dictionary meaning is "implausible" or "at odds" with generally accepted meanings. And as demonstrated above, a narrow reading of "carry a firearm" hardly "does violence" to the structure, language, and purpose of § 924(c)(1). On the contrary, a narrow reading best reflects an attention to these touchstones of statutory interpretation.

IV. CONCLUSION

For the foregoing reasons, the judgments of the Courts of Appeals should be reversed.

Respectfully submitted.

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APPENDIX

S. 1612 passed the Senate on October 3, 1996 in the following, simplified form:

> " . . . (a) In General.--Sections 924(c)(1) and 929(a)(1) of title 18, United States Code, are each amended by striking "uses or carries" and inserting "possesses."

"A bill to broaden the scope of certain firearms offenses, and for other purposes," 142 Cong. Rec. S12390 (daily ed. October 3, 1996) (other text of bill omitted).

S. 191, a descendant of S.43 proposed by Sen. Helms, passed the Senate in November 1997 in the following (excerpted) form:

> (a) IN GENERAL- Section 924(c) of title 18, United States Code, is amended--
> (1) by striking '(c)' and all that follows through '(2)' and inserting the following:
> '(c) POSSESSION OF FIREARM DURING COMMISSION OF CRIME OF VIOLENCE OR DRUG TRAFFICKING CRIME-
> '(1) TERM OF IMPRISONMENT-
> '(A) IN GENERAL- Except to the extent that a greater minimum sentence is otherwise provided by this subsection or by any other provision of law, any person who, during and in relation to any crime of violence or drug trafficking crime (including a crime of violence or drug trafficking crime that provides for an enhanced punishment if committed by the use of a deadly or dangerous weapon or device) for which a person may be prosecuted in a court of the

United States, uses or carries a firearm, *or who, in furtherance of any such crime, possesses a firearm,* shall, in addition to the punishment provided for such crime of violence or drug trafficking crime--
'(i) be sentenced to a term of imprisonment of not less than 5 years . . . .

"The Gun Act of 1997", 143 Cong. Rec. S12712 (daily ed. November 13, 1997) (emphasis added).

Legislation proposed in the House of Representatives has similarly been aimed at "possession," deriving from the apparent understanding that "carry" is a much narrower concept. *See* H.R. 424, "A bill to provide for increased mandatory minimum sentences for criminals possessing firearms, and for other purposes," one version of which, introduced on January 16, 1997, provided in relevant part:

Section 924(c)(1) of title 18, United States Code, is amended to read as follows:

"(c)(1)(A) A person who, during and in relation to any crime of violence or drug trafficking crime (including a crime of violence or drug trafficking crime which provides for an enhanced punishment if committed by the use of a deadly or dangerous weapon or device) for which the person may be prosecuted in a court of the United States, possesses a firearm shall, in addition to the punishment provided for such crime of violence or drug trafficking crime-
"(i) be imprisoned not less than 10 years;
"(ii) if the firearm is discharged during and

in relation to the crime, be imprisoned not less than 20 years; and
"(iii) if the death of a person results, be punished by death or by imprisonment for life . . ."

A later version, which was reported with an amendment, committed to the Committee of the Whole House on the State of the Union, and ordered to be printed on October 24, 1997, provided that:

Section 924(c) of title 18, United States Code, is amended- . . .
(2) by striking paragraph (1) and inserting the following:
"(1) A person who, during and in relation to any crime of violence or drug trafficking crime (including a crime of violence or drug trafficking crime which provides for an enhanced punishment if committed by the use of a deadly or dangerous weapon or device) for which the person may be prosecuted in a court of the United States-
(A) possesses a firearm in furtherance of the crime, shall, in addition to the sentence imposed for the crime of violence or drug trafficking crime, be sentenced to imprisonment for 10 years;
(B) brandishes a firearm, shall, in addition to the sentence imposed for the crime of violence or drug trafficking crime, be sentenced to imprisonment for 15 years; or
(C) discharges a firearm, shall, in addition to the sentence imposed for the crime of violence or drug trafficking crime, be sentenced to imprisonment for 20 years . . ."

Report No. 105-344.